80-1018

Supreme Court, U. S.
FILED
DEC 19 1980
MICHAEL RODAK, JR., CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

a) Whether the Indiana Mineral Lapse Act violates procedural due process protections of the Fourteenth Amendment, Section 1, of the Constitution of the United States by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

b) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract in violation of the Constitution of the United States, Article I, Section 10, by voiding contractual conveyances of mineral interests, with there being no overriding public interest which justifies the methods used in transferring ownership of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes a taking of private property without compensation and for private use in violation of the due process clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States, in that no compensation is given to the owner of the severed mineral interest upon the lapse of this interest pursuant to the statute and the ownership is thereby transferred to a private rather than public entity.

d) Whether the provision in the Indiana Mineral Lapse Act - which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim, must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county - violates the equal protection clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

THE PARTIES TO THE PROCEEDING

All of the parties to the proceeding are shown in the caption with the exception that Theodore L. Sendak, the Attorney General for the State of Indiana, is also a party to this Appeal, and has received notice of the appeal.

There is a companion case, although not consolidated with the present case, which raised substantially the same issues before the Supreme Court of Indiana as the present case, styled "*Louise F. Short v. Texaco, Inc., et al.*, Supreme Court of Indiana, No. 179 S. 23." Both this case and the *Short* case concern the constitutionality of the Indiana Mineral Lapse Act ("the Act") as applied to interests in oil, gas and other fugacious minerals. The instant case raises, additionally, the constitutionality of the act as applied to coal and other solid minerals. While the questions presented are largely parallel, certain conceptual distinctions were raised below which might dictate differing conclusions as between solid and fugacious minerals.

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REFERENCE TO THE OPINION BELOW

The Supreme Court of Indiana combined the present case with the aforementioned case of *Short v. Texaco, et al.*, for purposes of its opinion. This opinion is reported as *Short v. Texaco*, _____ Ind. _____, 406 N.E.2d 625 and it is reprinted in Appendix A hereto.

The unreported "Memorandum Opinion and Judgment on Agreed Case" entered by the Judge of the Gibson County Circuit Court, dated July 24, 1978, is reprinted in Appendix B hereto.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Indiana, declaring constitutional the Indiana Statute, Indiana Code 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, was entered on June 23, 1980.

A petition for rehearing, timely filed, was denied on September 24, 1980. (Appendix C)

A Notice of Appeal to this court was duly filed in the Supreme Court of Indiana on December 5, 1980. (Appendix D)

This Appeal is being docketed in this court within ninety (90) days from the denial of rehearing below. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, Subparagraph 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

14th Amendment, Section 1, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Sec. 10, United States Constitution:

"No state shall enter into any treaty, alliance or a confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility."

The Indiana Code (Compiler's additions shown in bold face type):

32-5-11-1 [46-1808]. Lapse of mineral interest - Prevention. - Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. **[IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-2 [46-1809]. Mineral interest - Definition. - A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. **[IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-3 [46-1810]. Use of mineral interests - Definition. - A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. [IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-4 [46-1811]. Statement of claim - Filing - Requirements. - The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date

the statement of claim was filed. [IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest - Exceptions. - Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-6 [46-1813]. Successor in interest - Notice requirements - Prima facie evidence. - Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 32-5-11-6, as added by Acts, 1971, P.L. 423, § 1.]

32-5-11-7 [46-1814]. Statement of claim - Filing - Recorder's duty. - Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 32-5-11-7, as added by Acts, 1971, P.L. 423, § 1.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions - Time limit. - The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 32-5-11-8, as added by Acts 1971, P.L. 423 § 1.]

STATEMENT OF THE CASE

The action at bar was filed in the Circuit Court of Gibson County, Indiana, as an Agreed Case, with an Agreed Statement of Facts, pursuant to an Indiana Statute, Indiana Code 1971, Sections 34-1-29-1 and following. The parties stipulated that the sole issue for determination by the trial court was whether the Indiana Mineral Lapse Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, was constitutional under the Constitution of the United States and the Constitution of the State of Indiana. All of the questions set forth in the section of this Jurisdictional Statement entitled "The Questions Presented for Review" were first raised and presented to the trial court. The Agreed Statement of Facts may be summarized as follows:

On March 1, 1954, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners as tenants in common of an eighty acre tract of land in Gibson County, Indiana. On that date, they conveyed by Warranty Deed this eighty acre tract to Ulysses Walden and Mildred Walden, his wife. This Warranty Deed contained a reservation of the total mineral estate by the grantors, Clara M. Haper, Eden H. Pond and Edna H. Bobe.

On August 13, 1959, Ulysses G. Walden and Mildred Walden conveyed by Warranty Deed to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife, a seventy-nine acre tract of land which was part of the aforementioned eighty acre tract.

About the year 1958, Clara M. Haper died intestate leaving as her sole and only heirs her daughters, Eden H. Pond and Edna H. Bobe, who succeeded to the interest of Clara M.

Haper in the severed minerals under the eighty acre tract.

On June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as lessors, made, executed and delivered to Consolidation Coal Company, as lessee, a coal mining lease covering forty acres of the aforementioned seventy-nine acre tract. On March 4, 1977, Ulysses Grant Walden, Jr., and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On the same date, March 4, 1977, there was published in the Princeton Daily Clarion, a daily newspaper in Gibson County, Indiana, a notice of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On May 27, 1977, Charles R. Nixon, as the Attorney for Ulysses Grant Walden, Jr., sent a notice to Consolidation Coal Company of the claim of his client, Ulysses Grant Walden, Jr.

On January 12, 1978, the Agreed Statement of Facts (Complaint) was filed in the Circuit Court of Gibson County, Indiana. It was stipulated by Eden H. Pond and Edna H. Bobe that they had made no use of the mineral interest as defined by the Mineral Lapse Act, and had not filed a Statement of Claim with the Recorder of Gibson County, Indiana, setting forth their ownership of the mineral interest. It was further stipulated by the parties that the sole question for determination by the trial court was whether the Indiana Mineral Lapse Act is constitutional under the Constitution of the United States and the Constitution of the State of Indiana. If the statute is unconstitutional, Eden H. Pond and Edna H. Bobe are the owners of the mineral interest in and under the subject property. If the Mineral Lapse Act is constitutional, the owners of the mineral interest pursuant to the statute are Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife.

Pursuant to an Indiana statute, the Attorney General of the State of Indiana was notified during the lawsuit that the constitutionality of a state statute was being questioned. The attorney general entered his appearance in the action and submitted trial briefs on the question of the constitutionality of the act. In addition, Louise F. Short filed a Petition to

Intervene in the action and such petition was granted by the court. After the questions regarding the constitutionality of the Indiana Mineral Lapse Act were fully briefed and oral argument was heard, the Trial Court rendered its "Memorandum Opinion and Judgment on the Agreed Case" [Appendix B] on July 24, 1978, holding that the Indiana Mineral Lapse Act was unconstitutional.

Several weeks after the trial court's opinion and judgement in the present case, the trial court issued its judgment in another case that was pending in the Gibson Circuit Court involving the constitutionality of the Indiana Mineral Lapse Act, which case was styled *Louise F. Short v. Texaco, Inc., et al.* This case involved oil and gas mineral interests only. The trial court held that the Indiana Mineral Lapse Act was also unconstitutional as it applied to oil and gas mineral interests.

Constitutional questions being involved, pursuant to the Indiana Rules of Appellate Procedure, a direct appeal was taken from the Trial Court judgment to the Supreme Court of Indiana. Again, all the questions presented in this appeal were raised, briefed and argued before the Supreme Court of Indiana. The Attorney General of the State of Indiana was a party to the appeal and represented the State of Indiana on the question of the constitutionality of the act. The aforementioned case of *Short v. Texaco* was also appealed directly to the Supreme Court of Indiana. The Supreme Court of Indiana combined the present case with *Short v. Texaco* for purposes of oral argument and opinion. However, the cases were never consolidated.

On June 23, 1980, the Supreme Court of Indiana issued a joint opinion in the two cases - the present case and *Short v. Texaco* - reversing the Trial Court and declaring that the Indiana Mineral Lapse Act was constitutional. A Petition for Rehearing was timely filed with the Supreme Court of Indiana, which petition was denied on September 24, 1980.

QUESTIONS ARE SUBSTANTIAL

The fundamental issue presented by this appeal is the determination of what constitutional parameters and guidelines apply to legislation of the same general nature and thrust of the Indiana Mineral Lapse Act. Legislative enactments similar to that here in question - variously designated as dormant mineral acts or mineral lapse acts - have become prevalent in recent years and have, in various forms and under various theories, been adopted in a number of states. As energy shortages continue and intensify, it is certain that additional efforts of a similar nature will be made, both in states which have not previously ventured into the particular area and in those where prior attempts have been found unconstitutional. Unless and until definitive guidance as to Federal Constitutional concerns is available from the ultimate arbiter, continued confusion and instability is inevitable, thus confounding the announced purposes of this family of legislation. The question is not whether the states are acting within the police power in enacting such legislation. Nor is it a question of whether such legislation is necessary or helpful in promoting mineral development, although there is a strong difference of opinion on the effectiveness of such legislation. Rather, what must be decided is exactly what constitutional safeguards should apply to this form of legislation. The Indiana Mineral Lapse Act is an example of a state legislature passing legislation in an attempt to promote mineral development, without due regard to appropriate constitutional safeguards.

Conflict Among States

Several other states in addition to Indiana have passed legislation generally similar to the Indiana Mineral Lapse Act. This type of legislation is commonly referred to as dormant mineral legislation. Such other states include Michigan, Wisconsin, Nebraska, Minnesota and Illinois. The constitutional validity of each of these dormant mineral statutes has been

challenged in their respective state courts.

The Supreme Court of Wisconsin considered the constitutionality of Wisconsin dormant mineral legislation in the case styled *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis. 2d 566, 259 N.W. 2d 316. Under the Wisconsin statute the owners of severed mineral rights were required to record the severance instrument with the register of deeds of the county within three years from the date of the act or the date of the instrument, whichever was later. Failure to record within this time period caused the mineral interest to revert to the surface fee owner. The Wisconsin statute differed from the Indiana Mineral Lapse Act in that "use" of the mineral interest did not preserve the mineral interest. In addition, the statute required payment of an initial, and thereafter an annual, registration fee to preserve the mineral rights. Failure to pay such registration fee within three years from the due date also resulted in the reversion of the mineral interest to the surface fee owner. The Supreme Court of Wisconsin held that the Wisconsin dormant mineral statute was unconstitutional because it denied procedural due process to the owner of the mineral interest and because it constituted a taking of private property from one person for the private use of another without compensation.

Two separate panels of the Court of Appeals in the State of Michigan have considered the constitutionality of that state's dormant mineral legislation and have reached directly opposite conclusions. The Michigan statute applied only to severed oil and gas interests. It provided that the owner of the oil and gas mineral interest had twenty years in which to make certain statutorily defined uses of the property or record a Notice of Interest with the register of deeds, or else the mineral interest would be deemed abandoned, with a reversion to the surface owner. There was also a three year grace period immediately following the effective date of the act allowing the mineral interest owners to record their notice preserving their interest. The Court of Appeals of Michigan in the case of *Bickle v. Fairchild*, (May, 1978) 83 Mich.App. 467, 268 N.W.2d 881, held the Michigan dormant mineral act to be unconstitutional as

applied to the defendants in that case, the owners of the mineral interest, in that it constituted an unconstitutional impairment of the obligations of contracts prohibited by the Constitution of the United States, Article 1, Section 10. In October of 1978, a second panel of the Court of Appeals of Michigan in the case of *Van Slooten v. Larsen*, (1978) _____ Mich.App. _____, 272 N.W.2d 675, held that the Michigan dormant mineral act was constitutional, finding that it was a valid exercise of the police power. This case did not cite the prior decision of *Bickle v. Fairchild*.

In December of 1978, the Supreme Court of Nebraska rendered an opinion regarding the constitutionality of the Nebraska dormant mineral act in a case styled *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768. The Nebraska statute applied to all severed mineral interests and provided that the owners of the surface could bring an action seeking a termination and extinguishment of the severed mineral interest, naming as parties-defendant all persons having or appearing to have an interest in the severed mineral interest. The severed mineral interest would be deemed abandoned if, for a period of twenty-three years prior to the filing of the lawsuit, certain satutorily defined uses of the property had not been made nor a verified claim of interest recorded. There was also a two year grace period after the effective date of the statute in which the severed mineral interest owner could assert his claim. The Supreme Court of Nebraska held that the Nebraska dormant mineral act was unconstitutional, insofar as it attempted to operate retroactively, as being violative of the due process and contract clauses of the United States and the Nebraska Constitutions.

The Minnesota Supreme Court in the case of *Contos v. Herbst*, (1979) _____ Minn. _____, 278 N.W.2d 732, considered the constitutionality of that state's dormant mineral legislation, which provided for the forfeiture of a severed mineral interest to the state unless the record owner filed a registration statement. Notice was provided for by publication in a newspaper within the local county and in two mining publications with nationwide circulation and the statute further

provided for compensation following forfeiture. However, the Supreme Court of Minnesota held that the statute was violative of due process in that it made no provision for a hearing to determine the validity of the forfeiture. An appeal from this decision was taken to this court, but was summarily dismissed for want of a substantial federal question. *James T. M. Prest, appellant v. Robert L. Herbst, et al., appellees*, No. 79-49, _____ U.S. _____, 100 SC 24, 62 L.Ed.2d 17. The dismissal of the appeal by this court in the *Contos* case, should be controlling in the present case on the question of the constitutionality of the Indiana Mineral Lapse Act.

Most recently the Supreme Court of the State of Illinois considered the question of the constitutionality of that state's dormant mineral legislation in the case of *Wilson v. Bishop*, (October, 1980) _____ Ill. _____, _____ N.E.2d_____. The Illinois statute provided that if a severed oil and gas mineral interest had not been produced, or a written notice filed with the County Recorder's Office setting out the ownership, within twenty-five years after its creation, the severed mineral interest would be deemed abandoned with the interest then vesting in the owner of the surface. There was a three year grace period after the effective date of the act to produce oil and gas or file the written notice. The Illinois Supreme Court held that the statute was unconstitutional in that the owners of the severed mineral interest were entitled to the procedural safeguards of due process and that failure to provide adequate notice and opportunity to be heard rendered the legislation unconstitutional.

As is apparent from the above synopses of the various state court cases determining the constitutionality of dormant mineral legislation, there is a conflict among the various jurisdictions regarding the applicability of constitutional provisions as to this general type of legislation. This conflict is further shown by the opinion of the Indiana Supreme Court in the present case in which it cited and discussed the aforementioned Wisconsin Supreme Court case of *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566 259 N.W.2d 316, which had held the Wisconsin Dormant Mineral Act unconstitutional. The Indiana Supreme Court,

in reaching the opposite conclusion on the constitutionality of this type of legislation, stated:

> "Based upon the foregoing analysis we do not find the case of *Chicago and Northwestern Transportation Company v. Pederson, supra*, persuasive.
>
> The reasoning of the Trial Court in the cases relied upon by it do not warrant the conclusion that the act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process." (406 N.E.2d at 629)

In the aforementioned Illinois Supreme Court case of *Wilson v. Bishop*, (October, 1980) _____ Ill. _____, _____ N.E.2d _____, in which the Illinois dormant mineral act was held to be unconstitutional, the Illinois Supreme Court considered the Indiana Supreme Court's decision in the present case and found it unpersuasive. The Illinois Supreme Court stated:

> "In *Short v. Texaco, Inc.*, (1980) _____ Ind. _____, 406 N.E.2d 625, however, the Indiana Supreme Court upheld a statute that provided for the reversion of severed mineral interests to surface owners if, after twenty years, no specified acts of ownership had occurred or no claim of interest had been filed within two years after the effective date of the act. The court concluded that the statute comported with procedural due process upon finding that its enactment, along with the opportunity to prevent reversion of the mineral interest by filing a claim of interest, provided sufficient notice to affected owners. That court also appears to have found support for its conclusion in the fact that such owners would receive notice and an opportunity to be heard if a court

> should be called upon at some future time to determine whether the statutory conditions of mandatory reversion had occurred. We are unpersuaded by these reasons and others which analogize the statute to ordinary statutes of limitations. * * *"

Given this conflict among the various state courts on the question of the constitutionality of dormant mineral legislation, there is a substantial uncertainty as to the constitutional validity of such legislation. Such uncertainty will continue until this court fully addresses and resolves the constitutional questions presented by this type of legislation. This constitutional uncertainty is particularly harmful since it affects record ownership of real estate. Certainty in record ownership of real estate is essential to the development of the property. Until this court addresses the constitutional questions raised by this type of legislation, there will be a chilling effect on development of mineral interests in those states having such legislation, including Indiana.

Constitutional Defects of Statute

The most flagrant constitutional defect of the Indiana Mineral Lapse Act is its failure to require the giving of notice and to provide a hearing prior to the taking - euphemistically called a lapse in the act - of the mineral interest or within any meaningful time period after the taking as required by procedural due process of the Fourteenth Amendment of the United States Constitution. The Indiana Mineral Lapse Act makes no provision for giving notice or providing a hearing before or after the taking of the mineral interest; rather, it provides for a preemptory, automatic, self-executing and irremediable taking. Indiana Code 32-5-11-1 states:

> "Any interest in coal, oil and gas, and other minerals, *shall*, (emphasis added) if unused for

> a period of twenty years be extinguished, unless a Statement of Claim is filed in accordance with Section 5 hereof, and the ownership *shall* (emphasis added) revert to the then owner of the interest out of which it was carved."

Indiana Code 32-5-11-6 states:

> "Any persons who will succeed to the ownership of any mineral interest, upon the lapse thereof, *may* (emphasis added) give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. * * *"

As can be seen, there is no requirement that notice be given prior to the lapse of the mineral interest. After the lapse of the mineral interest, the successor in interest *may* give notice to the mineral interest owner of the fact that the interest has already lapsed. Therefore, the taking of the mineral interest becomes final before any notice provision of the Indiana Mineral Lapse Act applies and then the successor in interest has the option of giving notice of the lapse or remaining silent, without any significant difference in result in most cases, whether or not notice is given.

This court has stated many times in the past that due process of law prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the case. *Mullane v. Central Hanover Trust Company*, (1950) 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, 872-73; *Memphis Light, Gas and Water Division v. Craft*, (1978) 436 U.S. 1, 98 S.Ct. 1554, 1562-63, 13-16, 56 L.Ed.2d 30, 41-43; *Ochoa v. Hernandez y Morales*, (1913) 230 U.S. 139, 33 S.Ct.

1033, 57 L.Ed. 1427, 1437. The Trial Court in the present case held the Indiana Mineral Lapse Act to be unconstitutional because of its failure to provide notice and a hearing as required by procedural due process. Furthermore, the Supreme Courts of the States of Wisconsin, Minnesota and Illinois held their states' dormant mineral legislation to be unconstitutional for failure to provide notice and a hearing pursuant to procedural due process requirements. *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W.2d 316; *Contos v. Herbst*, (1979) _____ Minn _____, 278 N.W.2d 732; *Wilson v. Bishop*, (October, 1980) _____ Ill _____, _____ N.E.2d _____.

The Indiana Mineral Lapse Act also violates Article 1, Section 10 of the Constitution of the United States by impairing the obligations of contracts. The Indiana Mineral Lapse Act provides for the transfer of a severed mineral interest from the owner of that interest to the person, or his successors or assigns, who contractually agreed to the original severance of the mineral interest. In two recent cases this court has reasserted that the contract clause is not without meaning in modern constitutional jurisprudence *United States Trust Company v. New Jersey*, (1977) 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92; *Allied Structural Steel Company v. Spannaus*, (1978) 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727, rehearing denied 99 S.Ct. 233. This court stated in the *Spannaus* decision that despite the customary deference courts give to state laws directed to economic problems, legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions appropriate to the public purpose justifying its adoption:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear." (98 S.Ct. 2723.)

The Indiana Mineral Lapse Act totally destroys the effect of a contractual agreement to sever the mineral interest from the surface. This legislation was passed without any showing

that an emergency existed justifying this severe impairment. Furthermore, less extreme measures, including giving prior notice, an opportunity for a hearing, and compensation to the owner of the severed mineral interest for the taking could have been employed to achieve the same ends. One panel of the Michigan Court of Appeals in the case of *Bickle v. Fairchild* (1978) 83 Mich.App. 467, 268 N.W.2d 881, and the Supreme Court of the State of Nebraska in the case of *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768, held that their respective state's dormant mineral legislation was constitutionally defective because of its violation of the contract clause of the United States Constitution.

Another basis on which the Indiana Mineral Lapse Act is unconstitutional is that it fails to compensate the owner of the mineral interest for the taking of that interest. This court has stated that it is a denial of due process to take property from one individual for the private use of another individual. *Missouri Pacific R. Co. v. Nebraska ex rel. Board of Transportation*, (1896) 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489, 495. The Indiana Supreme Court in this case stated that the Indiana Mineral Lapse Act did not constitute an exercise by the state of its power of eminent domain in that it was not actually a taking of the mineral interest for the use and benefit of the state. *Short v. Texaco*, (1980) _____ Ind. _____, 406 N.E.2d 625, 631. However, this taking of property from one individual and transferring it to another individual is even more constitutionally defective since such a transfer is strictly prohibited by the due process clause of the Fourteenth Amendment. The Supreme Court of the State of Wisconsin in the case of *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, held that one of the constitutional defects of the Wisconsin dormant mineral legislation was that it violated the rule that the legislature could not take private property from one person for the private use of another.

Each of the above three bases of constitutional attack on the Indiana Mineral Lapse Act has been used by other jurisdictions in striking down similar types of dormant mineral

legislation. However, the Indiana Mineral Lapse Act also violates the equal protection clause of the Fourteenth Amendment, while the other dormant mineral statutes do not.

There is a provision in the Indiana Mineral Lapse Act, Indiana Code 1971, 32-5-11-5, which provides that owners of ten or more mineral interests in a county who inadvertently fail to file a Statement of Claim, having made diligent effort to preserve all such interests not being used in the county, must be given written notice prior to the lapse of their mineral interest, when similar protection is not provided to owners of less than ten mineral interests in the county. It is recognized that in the local economic sphere, only an invidious discrimination, or wholly arbitrary act, will violate the equal protection clause of the Fourteenth Amendment. *City of New Orleans v. Duke*, (1976) 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511. However, the aforementioned provision in the Indiana Mineral Lapse Act makes an invidious discrimination and constitutes an arbitrary classification. It provides procedural due process notice to owners of extensive mineral interests, who generally would have substantial capital and personnel to keep abreast of legislation affecting their mineral interests, but denies similar procedural due process protection to small mineral interest owners who are generally in greater need of such protection. Constitutional and statutory safeguards should be provided for everyone similarly situated - not only for the politically powerful. Furthermore, since the purpose of the Indiana Mineral Lapse Act is to promote the development of mineral interests by identifying and locating the owners of the mineral interest, this purpose would best be served by giving prior notice to all mineral interest owners along with an opportunity for all mineral interest owners to protect their rights by filing a statement of claim before the lapse becomes final. It would seem that the administrative inconvenience involved would be minimal in requiring that all mineral interest owners be given advance notice and an opportunity to file a statement of claim prior to the lapse. It is evident that this classification in the Mineral Lapse Act was created without due regard to its reasonableness.

CONCLUSION

Due to the conflict among the various states in construing the constitutionality of the dormant mineral legislation, and given the substantial constitutional questions raised by such legislation, this court should note probable jurisdiction of this appeal.

APPENDIX A

OPINION AND JUDGMENT OF THE SUPREME COURT OF INDIANA

FOR
PUBLICATION

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IN THE

SUPREME COURT OF INDIANA

LOUISE F. SHORT,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 179 S 23
	)	
TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW d/b/a MAYHEW OIL AND GAS DEVELOPMENT, DeBEERS DIAMOND INVESTMENT, LTD.,	)	
	)	
Appellees,	)	
	)	
STATE OF INDIANA,	)	
	)	
Intervenor.	)	

ULYSSES G. WALDEN, JR. and CAROLYN SALLEE WALDEN,	)	
Appellants,	)	
v.	)	NO. 1278 S 303
EDEN H. POND, EDNA H. BOBE and CONSOLIDATION COAL CO.	)	
Appellees,	)	
LOUISE F. SHORT,	)	
Intervenor.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT

The Honorable Walter H. Palmer, Judge

DeBRULER, J. -

The trial court declared Ind. Code § § 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral interest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace

after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of

natural resources.

Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel v. Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the lawmaking power has either ignorantly, or wilfully violated the constitution. To justify the Courts in declaring an act void, it must be clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We reaffirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co. v. Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the surface rights owner. That court relied upon *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra*, primarily relied upon by the trial

court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * *
>
> An elementary and fundamental requirement of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at. 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. Burson, supra, relied upon by the trial court does not support the conclusion either. There a Georgia law provided that the drivers license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggrieved parties in the accident reports. In the course of holding this system violative of procedural due

process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted.) It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell*, a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co. v. Railroad Commission*, (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson National Bank v. Luckett*, (1944) 321

U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do not find the case of *Chicago & North Western Transportation Co. v. Pederson, supra*, persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman v. State ex rel. Department of Natural Resources*, (1979) _____ Ind. App. _____, 387 N.E. 2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society. . . .Property rights are not absolute and may be restricted by legislation which constitutes a proper exercise of the State's police power. . . .Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed. . . .The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interests are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is

free of the mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown v. Anderson*, (1883) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp. v. Donaldson*, (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love v. Lynchburg National Bank and Trust Co.*, (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analagous to acts of limitation which vests title to real and personal property.

Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins v. Barney's Lessee*, (1831) 5 Peters 457, is an early case upholding the validity of a seven year limitation upon actions to recover possession of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it existed in a state of nature, and is only modified by society, according to the discretion of each community."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

In *Terry v. Anderson*, (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie v. Wilson*, (1959) 240 Ind. 188, 162 N.E.2d 79; *Sansberry v. Hughes*, (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner v. People of State of New York*, (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for nonpayment of taxes would be conclusively presumed regular six months after the effective day of the statute was upheld as providing a reasonable period for bringing an action. Pursuant to Ind. Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a

reasonable time as contemplated by these cases.

In *Wilson v. Iseminger*, (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents, after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art. I, § 21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interests under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not

actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler v. Hilt*, (1936) 209 Ind. 541, 200 N.E. 219; *Foreman v. State ex rel. Department of National Resources, supra*. Appellees point to *Evansville & Crawfordsville R.R. Co. v. Dick*, (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind. Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:
>
> (1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the

county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests

and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objective of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

The Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al. v. St. Vincent Hospital, Inc. et al.*, No. 1078 S 216 (Ind. 5/16/80); *Steup, et al. v. Indiana Housing Authority*, No. 1179 S 309 (Ind. 4/2/80). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson v. Lee Optical of Oklahoma*, (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 99 L.Ed. 563; *Indiana Aeronautics Com'n. v. Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed. 2d 511.

There has been no demonstration made which convinces us that the classification of Ind. Code § 32-5-11-5 is invidiously discriminatory or wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

Givan, C.J., Hunter, Prentice and Pivarnik, JJ., concur.

APPENDIX B

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE

IN THE

GIBSON CIRCUIT COURT

1978 TERM

EDEN H. POND	)	NO. C-78-17
EDNA H. BOBE	)	
CONSOLIDATION COAL CO.	)	FILED
	)	Russell Kern
vs.	)	July 24, 1978
	)	Clerk of the
ULYSSES G. WALDEN, JR.	)	Gibson Circuit Court
CAROLYN SALLEE WALDEN	)	

ORDER ENTRY, JULY 25, 1978

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Sections 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statue, being I.C. 1971, 32-5-11-1 *et seq.* is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of

concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare, even to the extent of impairment of private contract. *Home Building and Loan v. Blaisdell*, (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell*, supra.

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result of this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to some one who would exploit them, arguably for the common good.

Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell v. Burnson* (1971), 402 U.S. 535; *Mullane v. Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306; *Goldberg v. Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane*, supra? It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislature taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

APPENDIX C

ORDER OF THE INDIANA SUPREME COURT DENYING REHEARING

IN

SUPREME COURT OF INDIANA

LOUISE F. SHORT	)	
Appellant,	)	
	)	
vs.	)	NO. 179 S 23
	)	
TEXACO, INC., et al	)	
Appellees.	)	
ULYSSES G. WALDEN, JR., et al	)	
Appellants,	)	
	)	
vs.	)	NO. 1278 S 303
	)	
EDEN H. POND, et al	)	
Appellees.	)	

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition for Rehearing.

Givan, C.J.

September 24, 1980

APPENDIX D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE

SUPREME COURT OF INDIANA

ULYSSES G. WALDEN, JR. CAROLYN SALLEE WALDEN, Appellants vs. EDEN H. POND, EDNA H. BOBE, CONSOLIDATION COAL CO., Appellees LOUISE F. SHORT, Intervenor.	)	NO. 1278 S 303 Appeals from the Gibson Circuit Court The Honorable Walter H. Palmer, Judge FILED Marjorie H. O'Laughlin December 5, 1980 Clerk of the Indiana Supreme Court and Court of Appeals

Notice is hereby given that Eden H. Pond, Edna H. Bobe, and Consolidation Coal Company, the Appellees above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana, reversing the judgment of the trial court, entered in this action on September 24, 1980.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph Two (2).

Dated this 5th day of December, 1980.

James M. Buthod

James M. Buthod (a Member of the Bar of the United States Supreme Court)

Attorney for Appellees Eden H. Pond, Edna H. Bobe and Consolidation Coal Company

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BUTHOD, LONGEST, BUTHOD AND RIETMAN
Citizens Bldg., Suite 409
115 Southeast Third Street
Evansville, Indiana 47708
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No. 80-1018

Supreme Court, U.S.
FILED
MAY 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

JOINT APPENDIX

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No. 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES OF GIBSON COUNTY CIRCUIT COURT (Trial Court)

January 12, 1978 --	Come now the Plaintiffs by James M. Buthod and come also the Defendants by Charles R. Nixon and file Agreed Statement of Facts [Complaint] relative to the above entitled cause of action.
January 12, 1978 --	Come now the Plaintiffs by James M. Buthod and come also the Defendants by Charles R. Nixon and file Submission of Agreed Case relative to the above entitled action.
March 3, 1978 --	Cause comes on for hearing as to an agreed controversy pursuant to I.C. 34-1-29-1 et seq. and the Court ORDERS the parties to file briefs on the law, the Court taking same under advisement. Plaintiffs shall have 21 days to file Brief, defendants shall have 21 days to answer and plaintiffs shall have 10 days to reply. Clerk ordered to certify copy of this order to the Attorney General of the State of Indiana.
April 19, 1978 --	Comes now the attorneys for Walden and Walden and request an Extension of Time to and including Monday, April 24, 1978, within which to file their Reply Brief heretofore ordered filed within 21 days after the filing of the Brief of Consolidation Coal Company, Pond and Bobe. Granted.
June 2, 1978 --	Come now the parties by counsel for argument on Plaintiffs' Reply Brief in Response to Defendants' Trial Brief. Court now notes the filing by Plaintiff of Brief in Response to State's Amicus Curiae Brief. Issues are now submitted to the Court.

June 8, 1978 -- Louise F. Short files Petition to Intervene pursuant to Trial Rule 24 (B), and no objection being heard by the Court at this time, the petition is granted. Intervenor files Brief in this cause.

July 25, 1978 -- Court now enters the following order: IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the plaintiffs herein and against the defendants, that plaintiffs shall recover their costs expended, that plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the agreed facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests. Judgment accordingly. cc: of Order to all attorneys of record.

October 11, 1978 -- Come now the defendants, by counsel, and file Praecipe for Transcript of Record for Use on Appeal.

October 3, 1980 -- Comes now the Clerk of the Supreme Court and Court of Appeals and files Official Opinion of the Supreme Court of the State of Indiana which is in words and figures following, to-wit: (HERE COPY)

(H.I. Judgment of the Indiana Supreme Court submitted herewith on page 37)

December 5, 1980 -- Come now Eden H. Pond. Edna H. Bobe and Consolidation Coal Company and file Notice of Appeal to

the Supreme Court of the United States and Affidavit of Mailing and Proof of Service.

RELEVANT DOCKET ENTRIES OF INDIANA SUPREME COURT

January 26, 1979 --	Record of Proceedings [docketed].
January 4, 1980 --	Under Appellate Rule 10, Petition for Oral Argument is Granted. Givan, C. J. - - Oral Argument set for Tuesday, January 29, 1980, at 1:30 p.m., ½ hour on each side. -- Givan, C.J.
January 23, 1980 --	Judgments reversed and causes remanded for enforcement of the Act - DeBruler, J., Givan, C.J., Hunter. Prentice and Pivarnik, J. J., concur.
July 12, 1980 --	Appellee's Petition for Rehearing (9), Brief in Support (9), Notice (2), Affidavit of Mailing and Proof of Service (2).
September 24, 1980 --	Petition for Rehearing Denied. Givan, C.J.
December 5, 1980 --	Notice of Appeal to the Supreme Court of the United States (2), Affidavit of Mailing and Proof of Service (2).

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	
Plaintiffs	)	CAUSE NO. C-78-17
	)	
vs.	)	Filed January 12, 1978
	)	Russell Kern
ULYSSES G. WALDEN, JR.	)	Clerk of the Gibson
CAROLYN SALLEE WALDEN	)	Circuit Court
Defendants	)	

AGREED STATEMENT OF FACTS

The undersigned, Eden H. Pond, Edna H. Bobe, Consolidation Coal Company, Ulysses G. Walden, Jr. and Carolyn Sallee Walden, being all of the parties in the above entitled matter, as and for their Agreed Statement of Facts made out and signed by each of said parties in accordance with the provisions of Indiana Code 1971, Section 34-1-29-1, do hereby each stipulate, agree and represent the following to constitute a true, complete and accurate statement of all facts relevant to the existence and resolution of the controversy between the parties relating to the ownership of the mineral estate in and to the following described real estate situate in Gibson County, State of Indiana, more fully described as follows, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet

South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less,

and that the same comprise the entire Statement of Facts upon which said controversy is submitted to the Court for determination, said agreed facts being as follows:

1. On March 1, 1954, and for several years prior thereto, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners, as tenants in common, each owning an undivided one-third interest, of the entire fee simple title in and to the following described lands in Gibson County, Indiana, to-wit:

The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West of the 2nd Principal Meridian.

2. On said date, March 1, 1954, the said Clara M. Haper, a widow, Eden H. Pond and Eddie Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, as Grantors, made, executed and delivered to Ulysses Walden and Mildred Walden, his wife, as Grantees, their certain warranty deed to the above described lands, which deed is recorded in Book 139 at page 169 in the Office of the Recorder of Gibson County, Indiana, and which deed contained a reservation of the mineral estate to the Grantors in the form shown by a copy of said deed, attached hereto as Exhibit "A".

3. Thereafter, under date of February 25, 1957, the said Grantors made, executed and delivered unto the same Grantees a certain correction warranty deed,

covering the above described lands, which correction warranty deed was recorded on February 28, 1957, in Deed Record 147, at page 25, in the Office of the Recorder of Gibson County, Indiana, and which contained certain corrections as more fully set forth in a copy thereof, attached hereto as Exhibit "B".

4. Thereafter, under date of August 13, 1959, Ulysses G. Walden and Mildred Walden, husband and wife, as Grantors, made, executed and delivered to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, husband and wife, as Grantees, their certain warranty deed covering a part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less, attached hereto as Exhibit "C", which deed was thereafter recorded in Book 153, page 296, in the Office of the Recorder of Gibson County, Indiana.

5. Thereafter, about the year 1958, the said Clara M. Haper died intestate, leaving as her sole and only heirs at law, her daughters, Eden H. Pond and Edna H. Bobe, who succeeded to the entire estate of Clara M. Haper with respect to the real estate above described; and the said Eden H. Pond and Edna H. Bobe are now, and have been since the death of the said Clara M. Haper, the owners as tenants in common, in equal proportions, of the entire mineral estate reserved by prior conveyances as above set forth, insofar as such reserved interests remain in force and effect.

6. Thereafter, under date of June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as Lessors, made, executed and delivered unto Consolidation Coal Company, as Lessee, a certain Coal

Mining Lease covering the Southwest Quarter of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, Gibson County, Indiana, a copy of which lease is attached hereto as Exhibit "D", and which lease was recorded in Miscellaneous Drawer 2, on Card 7648, in the Office of the Recorder of Gibson County, Indiana.

7. On March 4, 1977, by notice dated March 2, 1977, Ulysses Grant Walden, Jr. and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond, entitled "Notice of Lapse of Mineral Interest", a copy of which notice is attached hereto as Exhibit "E".

8. Said "Notice of Lapse of Mineral Interest" was published in the Princeton Daily Clarion one time, on March 4, 1977, as evidenced by the Publisher's Affidavit attached hereto and marked Exhibit "F".

9. Under date of May 27, 1977, Charles R. Nixon, as attorney for Ulysses Grant Walden, Jr., notified Consolidation Coal Company in writing of the claim of Ulysses Grant Walden, Jr., a copy of said letter of notification being attached hereto as Exhibit "G".

10. In the year 1971, the General Assembly of the State of Indiana enacted a certain statute, generally designated as the Mineral Lapse Act or the Dormant Minerals Act, which provisions were thereafter codified as Indiana Code, 1971, Section 32-5-11-1 through 32-5-11-8, which Act became effective with the promulgation of the acts of the General Assembly for the year 1971 early in the month of September, 1971. A copy of the provisions of said Act are, for convenience of reference, attached hereto as Exhibit "H".

11. Plaintiffs have not at any time filed a statement of claim as provided for in said Mineral Lapse Act.

12. None of Plaintiffs have done or performed any acts which would constitute the "use" of the reserved mineral estate, as the term "use" is defined in Indiana Code 1971, Section 32-5-11-2. None of Plaintiffs have paid any taxes with respect to said reserved mineral estate nor have taxes been separately assessed with respect to said reserved mineral estate at any time.

13. Consolidation Coal Company has complied with all the terms, conditions and provisions necessary to keep its Coal Mining Lease in full force and effect with respect to the interests of Eden H. Pond and Edna H. Bobe, and the same is a valid and subsisting lease covering said interests as the same may eventually be established.

14. The reservation of the mineral estate contained in Exhibit "A" and Exhibit "B" attached hereto was intended to and was sufficient to reserve the entire mineral estate with respect to both coal and other solid minerals and oil, gas and other fugacious minerals and was a valid reservation thereof at the time such reservation was made.

15. With the exception of Exhibit "H", which is hereby stipulated to be a true, correct and accurate copy of the provisions of the Indiana Mineral Lapse Act as the same appear in Burns Indiana Statutes Annotated, Code Edition, Sections 32-5-11-1 through 32-5-11-8, each of the Exhibits attached hereto is hereby stipulated to be a true, correct and accurate copy of the document which it purports to be; and each of said documents is stipulated to be authentic and the signatures thereon to be genuine; and each of said documents is stipulated to be a valid and subsisting instrument in accordance with the tenor thereof.

16. The Plaintiffs, Eden H. Pond and Edna H. Bobe, are the owners, as tenants in common, in equal proportions, of the entire mineral estate in and to the above described real estate, subject only to the Coal Mining Lease to Consolidation Coal Company on a portion thereof, unless their interest therein has been terminated by operation of the Mineral Lapse Act, above designated; and each of said Plaintiffs assert that said Mineral Lapse Act is inoperative to terminate the interest of said Plaintiffs by reason of its unconstitutionality, inapplicability and otherwise as more fully set forth in the brief of said Plaintiffs.

17. Defendants assert that the provisions of the Mineral Lapse Act have terminated all rights of Plaintiffs

with respect to the mineral estate in and to the lands above described, and that by reason thereof, such mineral estate has reverted to the estate from which it was carved, said estate from which it was carved being now owned solely by Defendants as tenants by the entireties; and Defendants assert the constitutionality and applicability of said Mineral Lapse Act as more fully set forth in the brief of Defendants

The parties further stipulate that the sole issue for determination in this cause is the constitutionality of the provisions of Indiana Code 1971, Section 32-5-11-1 through 32-5-11-8, inclusive, under the Constitutions of the United States of America and of the State of Indiana and under each and all of the applicable provisions of said Constitution as such provisions of the Indiana Code 1971 may be applied or be applicable to the Agreed Statement of Facts above set forth. If such provisions are constitutional and applicable with respect to grants or reservations made prior to the effective date of the Act, then Defendants must prevail and all title of Plaintiffs with respect to the subject real estate will have terminated. If, on the other hand, the provisions of said Indiana Code Sections are unconstitutional as applied to the Agreed Statement of Facts, then Plaintiffs must prevail and Defendants' rights with respect to the subject real estate are subject to the mineral reservations heretofore made and now owned by Plaintiffs, to the extent of the form and manner of such reservations.

Each of the undersigned parties therefore stipulate that the above and foregoing constitutes an Agreed Statement of Facts upon which the said controversy among the parties shall be determined, each of such parties executing this Agreed Statement of Facts on the dates set opposite their respective signatures below.

November 17, 1977 — /S/ Eden H. Pond
DATE — Eden H. Pond

November 17, 1977 — /S/ Edna H. Bobe
DATE — Edna H. Bobe

CONSOLIDATION COAL COMPANY

December 2, 1977 — By: /S/ George G. Schneider
DATE — Senior Vice President

December 12, 1977 — /S/ Ulysses G. Walden, Jr.
DATE — Ulysses G. Walden, Jr.

December 12, 1977 — /S/ Carolyn Sallee Walden
DATE — Carolyn Sallee Walden

EXHIBIT "A"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH, That Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, of Gibson County, Edna H. Bobe and Raymond W. Bobe, her husband, of Knox County, all in the State of Indiana

CONVEY AND WARRANT

to Ulysses Walden and Mildred Walden, his wife, of Gibson County, in the State of Indiana, for the sum of One Dollar and other valuable consideration, the receipt whereof is hereby acknowledged, the following described real estate, situate in Gibson County, in the State of Indiana, to-wit:

The West one-half of the Northwest Quarter of Section Number Thirty-Four (34), Township One

(1) South, Range Ten (10) West, containing eighty acres more or less. Provided always the grantors reserve unto themselves all mineral rights underlying the above described real estate with the right to explore the same, and to sell the same and remove them from said real estate, without any charge whatever. The Grantees assume and agree to pay the taxes assessed against real estate for the year 1954 and payable May and September of said year and thereafter. Provided always, again that any Lessee or the Grantors herein for the purpose of developing and/or exploring any and all mineral rights underlying the above described real estate shall pay to the Grantees all damages done to the above real estate by reason of making a road or roads over and through the above described real estate which may be reasonable in amount not to exceed One Hundred Dollars ($100.00) per acre.

IN TESTIMONY WHEREOF, the said Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, Edna H. Bobe and Raymond W. Bobe, her husband, have hereunto set their hands and seals this 1st day of March 1954.

/S/ Clara M. Haper
Clara M. Haper

/S/ Edna H. Bobe
Edna H. Bobe

/S/ Eden H. Pond
Eden H. Pond

/S/ Raymond W. Bobe
Raymond W. Bobe

/S/ Eddie C. Pond
Eddie C. Pond

(Acknowledgement omitted)

EXHIBIT "B"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH that Clara M. Haper, a widow, Eden H. Pond and Eddie C. Pond, her husband, of Gibson County, State of Indiana, and Edna H. Bobe and Raymond W. Bobe, her husband, of Knox County, State of Indiana, Convey and Warrant to Ulysses Walden and Mildred Walden, his wife, of Gibson County, State of Indiana, for the sum of One Dollar ($1.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the following described real estate situated in Gibson County, in the State of Indiana, to-wit:

> The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West containing 80 acres, more or less; provided always the Grantors reserve unto themselves all mineral rights underlying the above described real estate with the right to explore the same and to sell the same and remove them from said real estate without any charge whatever; provided always again that any Lessee of the Grantors herein for the purpose of developing and/or exploring any and all mineral rights underlying the above described real estate, shall pay the Grantees all damages done to the above real estate, and to any improvements thereon, including any road or roads over and through the above described real estate which may be reasonable in an amount not to exceed $100.00 per acre.

This deed is made to correct an error relative to the item of damages, if any, caused in the future by the developing and/or exploring for any minerals underlying said real estate, such former deed bearing date of March 1, 1954, and recorded in Deed Record 139, page 169, in the Office of the Recorder of

said county, it having been the intention of the parties by such prior deed to convey and include the damages hereinabove set forth.

In testimony whereof, the said Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, have hereunto set their hands and seals this 25th day of February, 1957.

/S/ Clara M. Haper
Clara M. Haper

/S/ Edna H. Bobe
Edna H. Bobe

/S/ Eden H. Pond
Eden H. Pond

/S/ Raymond W. Bobe
Raymond W. Bobe

/S/ Eddie C. Pond
Eddie C. Pond

(Acknowledgement Omitted)

EXHIBIT "C"
To Agreed Statement of Facts

WARRANTY DEED

THIS INDENTURE WITNESSETH, That Ulysses G. Walden and Mildred Walden, husband and wife, of Gibson County, in the State of Indiana

CONVEY AND WARRANT

to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, husband and wife, of Gibson County, in the State of Indiana, for and in consideration of One Dollar ($1.00), the receipt whereof is hereby acknowledged, the following described real estate in Gibson County, in the State of Indiana, to-wit:

A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less; and

Also, a strip of ground of the uniform width of 12½ feet off of the West side of the East Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, the West line of which coincides with the West line of said half quarter section;

Also, the West Half of the Southwest Quarter of Section 34, Township 1 South, Range 10 West, containing 80 acres more or less, subject to oil and gas reservation shown at deed record 119, page 313.

The grantees herein, as the consideration of this conveyance, hereby assume and agree to pay a certain mortgage against said real estate and other lands dated January 21, 1959, and acknowledged and recorded on said day in Mortgage Record 180, at page 453, of the records in the Office of the Recorder of Gibson County, in the State of Indiana, the same being in the original principal sum of $12,324.00, and upon which there is now due and upaid the sum of $12,050.92 and said grantees further assume and agree to pay the indebtedness secured by said mortgage.

The grantees agree to pay the taxes against the real estate described in said mortgage beginning with the November installment of the 1958 taxes, payable to November, 1959, and thereafter.

IN WITNESS WHEREOF, the said Ulysses G. Walden and Mildred Walden, husband and wife, have hereunto set their hands and seals, this 13th day of August, 1959.

/S/ Ulysses G. Walden
Ulysses G. Walden

/S/ Mildred Walden
Mildred Walden

(Acknowledgement Omitted)

EXHIBIT "D"
To Agreed Statement of Facts

FORM L 76 (1)

COAL MINING LEASE

THIS LEASE, made this 17th day of June, 1976, BETWEEN Eden H. Pond, a widow, and Edna H. Bobe and Raymond W. Bobe, her husband, whose address is 613 S. Prince Street, Princeton, Indiana, hereinafter called the "Lessor" and CONSOLIDATION COAL COMPANY whose address is 3300 One Oliver Plaza, Pittsburgh, Pennsylvania 15222, hereinafter called the "Lessee".

1. LEASE OF COAL AND EXPLORATION RIGHTS: Lessor, for and in consideration of the sum of Two Hundred and No/100 Dollars ($200.00) advance royalty in hand paid, and of the royalties to be paid by Lessee and the agreements to be performed by Lessee, does hereby grant, lease and let exclusively unto Lessee, its successors and assigns, all of the coal and other materials which are necessarily removed in the

coal mining process (the "coal") in and underlying the following described lands situated in Gibson County, Indiana, to-wit:

The Southwest Quarter of the Northwest Quarter of Section 34, Township 1 South, Range 10 West.

CONTAINING 40 acres, more or less, (hereinafter called the "premises"). Premises shall also include all of the coal in and under all land or interests therein owned or claimed by Lessor contiguous or appurtenant to said described lands. TOGETHER WITH the exclusive right of Lessee (alone or conjointly with coal under neighboring lands) to mine and remove all of said coal and the free and uninterrupted right and right-of-way into, through and under the said land at such points and in such manner as may be convenient or necessary for the purpose of all operations in said coal and in the horizons thereof, and the strata above or below the same, and in other coal now owned or leased or hereafter acquired by Lessee, its successors or assigns, including the right to explore, test drill, dig, mine, drain, ventilate, transport and carry away said coal and other materials and other coal and materials now owned or leased or which may hereafter be acquired by Lessee, its successors or assigns, by any mining methods or machinery now or hereafter employed without being required to lease or provide subjacent or sublateral support for the overlying strata or surface or anything therein, thereon or thereunder. Lessee shall have the right to enter upon the surface of the land, to operate, maintain and finally remove such facilities and services (including but not limited to those required to provide power, communication, transportation, ventilation and drainage) as may be necessary or convenient for the prosecution of the mining operations hereunder, with rights of ingress, egress and regress to and from the same. Water pipe lines shall be buried by Lessee below plow depth, and wherever practical boreholes and other facilities shall be located near fence and property lines. Lessee shall pay for damage caused by it to the growing crops on the leased premises. It is understood and agreed that the rights hereinbefore mentioned are in enlargement and not in restriction of the rights incidental

to the ownership of said coal.

2. TERM: Unless sooner terminated as herein provided, this lease is for an initial term of 20 years from date (and, if extended as provided in paragraph 3, for an additional term of 20 years) and so long thereafter as mining operations are being conducted by or for Lessee on, or within ten miles of any boundary of the premises.

3. ADVANCE ROYALTIES: Until mining operations are commenced to remove the coal underlying the premises, Lessee shall pay or tender to Lessor as advanced royalty during the initial term the sum of $5.00 per acre for the first year of this lease, and thereafter the sum of $2.00 per acre per year commencing one year from the date hereof, with a like payment payable on or before each anniversary date of this lease for the second through the nineteenth anniversary dates. If mining operations have not been commenced on the premises within 20 years from the date hereof, Lessee may further extend the term of this lease by paying to Lessor on or before the twentieth anniversary the sum of $10.00 per acre, and thereafter on or before each subsequent anniversary date the sum of $4.00 per acre until mining operations are commenced on the premises. All advance royalties are fully recoupable by Lessee from earned royalties.

4. EARNED ROYALTIES: After Lessee has commenced or caused to be commenced actual mining operations in, and/or under the premises, all further liability for advanced royalties shall forthwith terminate, and Lessee will thereupon pay or credit to Lessor earned royalty for all coal mined and sold from the premises the sum of 15¢ per ton of 2,000 pounds or 2.5% of the average gross realization price f.o.b. mine, whichever is the greater. Railroad weights shall be taken as the basis for payment of such earned royalty when coal is loaded and weighed on railroad cars, and when not so loaded and weighed, then other fair and accurate weights and measurements shall be taken as the basis for payment. Earned royalties shall be paid or credited on or before the thirtieth day following the close of any calendar month. The quantity and quality of coal removed from the premises shall be in the sole discretion of

the Lessee, and no royalty shall be paid on any unmerchantable coal or other materials removed as a part of the mining process. If the coal is used by Lessee in its own operation or sold to an affiliated company, the price used in the computation of earned royalty shall be the reasonable market value of similar coal produced in the area and sold at arm's length. For the purpose of this lease, "gross realization price" shall mean the price for that coal produced, saved and sold by the Lessee from the leased premises, exclusive of any sales, severance, land or other taxes not based on net income, and any other cost or levy resulting from any governmental statute or regulation.

5. RECORDS: Lessee shall keep a true and correct record of all coal mined, removed and sold from the premises and Lessor at all reasonable times shall have the right to inspect the same. All statements rendered by Lessee for earned royalty or advance royalty shall be conclusive and final two years from the time of rendition as to the quantity of coal mined, removed and sold and/or royalty due during such period unless written objection shall be made by Lessor within such period.

6. MINING OPERATIONS: Lessee agrees to conduct all mining operations in compliance with the regulations and laws of the State of Indiana and the United States. Lessee shall not be required to maintain a barrier pillar in the coal between the leased premises and any contiguous coal owned, leased or controlled by Lessee.

7. TITLE OF LESSOR: Lessor warrants that Lessor holds merchantable title to the leased premises in fee simple free and clear of all liens and encumbrances, except such as may be hereinafter noted; that Lessor has the lawful right to make this lease, and that Lessee will have peaceable possession of the premises for the full term of this lease. Lessor shall deliver to Lessee upon request any abstracts or title papers which it may have and Lessee shall be privileged to duplicate or reproduce such abstracts and title papers and to retain the originals for a reasonable time. Without impairment of Lessor's warranty and subject to all other provisions hereof, it is agreed that if objections be found to Lessor's title, Lessor

shall cooperate with Lessee in satisfying such objections, and further that Lessee may take such steps as it deems necessary to remedy such title defects. If said Lessor owns a lesser interest in the above described land than the entire and undivided fee simple estate therein, then the royalties herein provided shall be paid the Lessor only in proportion which his interest bears to the whole undivided fee. If any dispute shall arise as to Lessor's ownership of the coal, Lessee may without liability suspend payments until such ownership is finally determined.

8. TAXES AND LIENS: Lessor covenants to pay all taxes and assessments upon the land and the coal hereby leased, but each party shall pay its own share of any production or severance taxes. Lessee shall have the right to pay any delinquent mortgage, tax, lien, encumbrance, or assessments on the premises, and same may be deducted from future advance royalties or from earned royalties.

9. TERMINATION: If either Lessee or Lessor shall default in the performance of any of the covenants, agreements or provisions of this lease, and such default shall continue for sixty (60) days after written notice of such default to the aggrieved party to the other party, said aggrieved party shall have the option of cancelling and terminating this lease. Lessee shall have the right to terminate this lease (in whole or in part) at any time by paying all royalties then due and giving Lessor sixty (60) days written notice of such intention. In such event, Lessee shall execute and record at Lessee's expense, a proper release of this lease, and except as otherwise herein specifically provided both parties shall thereupon be released from all obligations hereunder. Lessee shall have the right to remove any of its property from the premises within one (1) year after the termination of this lease. Lessee's right to utilize underground tunnels under the premises shall continue for so long as mining operations are conducted on, or within ten miles of, the premises.

10. NOTICES AND PAYMENTS: All payments herein provided for may be made by mailing the same to Lessor or by paying or tendering to Eden H. Pond, 613 S. Prince Street, Princeton, Indiana 47670, or her successors, which shall con-

tinue as the depository regardless of the changes in ownership of said land, applicable sums of advanced or earned royalties. If said bank shall fail or refuse to accept payments, Lessee shall not be held in default until sixty (60) days after receipt from Lessor of a recordable instrument designating a different depository bank. In the event payments are made directly to Lessor, Lessee shall not be held in default until sixty (60) days after receipt from Lessor of a recordable instrument designating a new address of Lessor. All payments sent to the last known address of Lessor shall constitute payment hereunder. Any notice required or permitted hereunder may be served personally or by certified or registered mail on the parties at the addresses shown above or such other address as may be communicated to the parties in writing. No change in ownership of the premises or royalties hereunder shall be binding on Lessee until Lessor has furnished Lessee with either the original recorded instrument of conveyance or a certified copy thereof sufficient to show a complete chain of title in the Lessor.

11. FORCE MAJEURE: Mining shall not be deemed to have "terminated" or "ceased" and it shall be deemed that coal is being mined if mining or mining operations are suspended or are prevented or prohibited by law, ordinance or other governmental regulations, restraint or court order, by inability to obtain permits or licenses, by scarcity or inability to obtain equipment, material, power or fuel, by strike, lockout or industrial disturbance, by failure of carriers to transport or furnish facilities for transportation, by operation of force majeure (including, without limitation, lightning, earthquake, fire, storm, flood, washout), by breakage or accident to machinery or facilities, or by any cause beyond Lessee's control, provided that Lessee shall exercise reasonable diligence to resume mining operations. Lessee shall have the right to determine and settle any strikes, lockouts or industrial disputes in its sole discretion, and the aforesaid requirement of exercising reasonable diligence to resume mining shall not require Lessee to accede to any demand or position of any other party involved in such strike, lockout or industrial dispute.

12. PARTIES: This lease shall be binding upon and shall

inure to the benefit of the parties hereto, their heirs, successors, personal representatives and assigns. The Lessor does hereby waive and release any rights of dower and homestead in the premises insofar as such rights may in any way be affected hereby. Whenever the context requires, the singular shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders. Unless otherwise designated, any party who signs this lease shall be deemed a Lessor whether or not named in the body of this lease, and any party who signs this lease accepts its terms as to his or its interest regardless of whether or not all named parties shall execute this lease.

13. AMENDMENT: Paragraph 3 hereinabove is hereby amended in that unless this lease is terminated as hereinprovided Lessee will pay an advance royalty of $5.00 per acre per year for 20 years and if extended for an additional 20 years Lessee will pay an advance royalty of $5.00 per acre per year.

IN WITNESS WHEREOF, Lessor has executed this Coal Mining Lease as of the day and date first above written.

/S/ Eden H. Pond (Seal) /S/ Edna H. Bobe

S.S. Number 303-10-0697 S.S. Number 308-40-4713

(Seal) /S/ Raymond W. Bobe

S.S. Number 311-18-6543

(Acknowledgement Omitted)

EXHIBIT "E"
To Agreed Statement of Facts

NOTICE OF LAPSE OF MINERAL INTEREST

TO: Edna H. Bobe
Main Street Rd.
Vincennes, Indiana 47591

Eden H. Pond
613 S. Prince St.
Princeton, Indiana 47670

1. The undersigned, successors in interest to the mineral interest hereinafter described, hereby give notice pursuant to Indiana Code 1971, 32-5-11-6 as added by Acts 1971, Public Law 423, § 1, p. 1970, in order to extinguish of record the mineral interest hereinafter described by reason of a lapse thereof under the provisions of said act.

2. The interest extinguished is that interest created by a reservation in favor of the Grantors in that certain Warranty Deed dated March 1, 1954, and recorded in Deed Record 139, Page 169, in the Office of the Recorder of Gibson County, Indiana, wherein Ulysses Walden and Mildred Walden, husband and wife, were Grantees and Clara M. Haper, widow, Eden H. Pond and Eddie C. Pond, her husband, and Edna H. Bobe and Raymond W. Bobe, her husband, were Grantees by which reservations the Grantors reserved unto themselves all mineral rights underlying the real estate hereinafter described with the right to explore the same and sell the same and remove them from said real estate which real estate is located in Gibson County, Indiana, and described as follows:

> The West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, containing eighty (80) acres, more or less.

3. The Owners of such mineral interest, as shown of record, now are Edna H. Bobe and Eden H. Pond.

4. The undersigned are now the owners of the following described real estate located in Gibson County, in the State of Indiana, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less.

which includes a part of the real estate described in paragraph 2 above.

5. The records in the Office of the Recorder of Gibson County, Indiana, show that you have not filed in the Office of said Recorder a statement of claim as required by the provisions of the Indiana Code 1971, 32-5-11-4 as added by Acts 1971, Public Law 423, § 1, p. 1970.

6. This notice is given by the undersigned, the owners in fee simple of the above described real estate.

DATED this 2nd day of March, 1977.

/S/ Ulysses Grant Walden, Jr.
ULYSSES GRANT WALDEN, JR.

/S/ Carolyn Sallee Walden
CAROLYN SALLEE WALDEN

EXHIBIT "F"
To Agreed Statement of Facts

PUBLISHER'S AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

Personally appeared before me, a Notary Public, in and for said County and State, the undersigned Edward C. Cochrane who, being duly sworn, says that he is Publisher of the Princeton Daily Clarion, a daily newspaper of general circulation printed and published in the English language in the City of Princeton, Indiana, in state and county aforesaid, and that the printed matter attached hereto is a true copy, which was duly published in said paper for 1 time, the dates of publication being as follows: March 4, 1977.

/S/ Edward C. Cochrane

Subscribed and sworn to before me this 4th day of March, 1980.

/S/ Jean Harder
Notary Public

My commission expired 9-9-80.

EXHIBIT "G"
To Agreed Statement of Facts

Law Offices
McDONALD, McDONALD & NIXON
Box 400
120 South Main Street
PRINCETON, INDIANA
47670

May 27, 1977

Consolidation Coal Company
3300 One Oliver Plaza
Pittsburgh, Pennsylvania 15222

In Re: Coal Mine Lease with Edna H. Bobe and Eden H. Pond as Lessors

Gentlemen:

Our office represents Ulysses Grant Walden, Jr., the owner of certain real estate in Gibson County, Indiana, on which your comp y took a coal mining lease from the above Lessors.

On March 4, 1977, Ulysses Grant Walden, Jr., served Notice of Lapse of Mineral Interest on Edna H. Bobe and Eden H. Pond pursuant to Indiana Code 1971 32-5-11-4. More than sixty (60) days have now elapsed and no statement of claim has been filed by the record owners of that mineral interest namely, Eden H. Pond and Edna H. Bobe. Their interest, therefore, elapsed.

At the time you obtained this lease, the Lessors' interest in the minerals had lapsed all of which your company knew about and accordingly the Lessors in that Lease had no interest to lease.

Therefore, this letter is a demand that you execute a

Release of the coal mining lease and remove the cloud from the title of Ulysses Grant Walden, Jr. and his wife. If this is not done on or before June 10, 1977, we shall assume that it will be necessary to file a Quiet Title Action.

Thank you.

Very truly yours,

McDONALD, McDONALD & NIXON

By /S/ Charles R. Nixon
Charles R. Nixon

CRN/gs

EXHIBIT "H"
To Agreed Statement of Facts

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

32-5-11-1 [46-1808]. Lapse of mineral interest - Prevention. - Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest - Definition. - A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests - Definition. - A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage

or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. [IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-4 [46-1811]. Statement of claim - Filing - Requirements. - The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest - Exceptions. - Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-6 [46-1813]. Successor in interest - Notice requirements - Prima facie evidence. - Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 32-5-11-6, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-7 [46-1814]. Statement of claim - Filing - Recorder's duty. - Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the

county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 32-5-11-7, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions - Time limit. - The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 32-5-11-8, as added by Acts 1971, P.L. 423, § 1.]

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	CAUSE NO. C-78-17
Plaintiffs	)	Filed January 12, 1978
	)	Russell Kern
vs.	)	Clerk of the
	)	Gibson Circuit Court
ULYSSES G. WALDEN, JR.	)	
CAROLYN SALLEE WALDEN	)	
Defendants	)	

SUBMISSION OF AGREED CASE

Come now the Plaintiffs by James M. Buthod of the Law Offices of James M. Buthod, attorneys for Plaintiffs, and come also the Defendants by Charles R. Nixon, of the

Law Offices of McDonald, McDonald and Nixon, attorneys for Defendants (said parties being respectively designated "Plaintiffs" and "Defendants" for convenience of reference, notwithstanding the submission hereof as an Agreed Case), and pursuant to the provisions of Indiana Code 1971, Sections 34-1-29-1 and following, the said parties submit to the Court as an Agreed Case a matter of controversy between Plaintiffs and Defendants, to-wit:

Determination and declaration of the ownership of the mineral estate in and to the following described real estate situate in Gibson County, State of Indiana, more fully described as follows, to-wit:

> A part of the West Half of the Northwest Quarter of Section 34, Township 1 South, Range 10 West, bounded as follows: BEGIN at a point 25 feet South of the Northwest corner of said half quarter section and run thence East to a point which is 25 feet West of the East line thereof; thence South to a point which is 10 rods South of the North line thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence East 25 feet; thence South to the Southeast corner thereof; thence West to the Southwest corner thereof; thence North to the place of beginning, containing 79 acres, more or less,

as more fully set forth in the Agreed Statement of Facts made out and signed by the parties and attached hereto.

Attached hereto and made a part of this submission are each of the following:

1. The Agreed Statement of Facts made out and signed by the parties, together with the exhibits attached there-

to, which exhibits are stipulated to be true and correct copies of the instruments which they respectively purport to be.

2. Affidavits by each of the parties that the controversy here involved is real and that these proceedings are brought in good faith to determine such controversy.

3. Appearances by the respective parties in person and appearances of counsel, and waiver of the insurance and service of process by each of the parties, whether designated as Plaintiffs or Defendants.

Inasmuch as Plaintiffs allege the unconstitutionality of a certain statute of the State of Indiana, being the so-called Mineral Lapse Act or Dormant Minerals Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, inclusive, and seek declaratory relief, therefore in accordance with the Indiana Code Section 34-4-10-11, the Attorney General of the State of Indiana has been served with a copy of these proceedings and is entitled to be heard herein.

The parties, therefore, pray the Court to determine, upon the basis of the Agreed Statement of Facts and Exhibits attached thereto, the constitutionality of the provisions of Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, inclusive, as the same may be applied to the Agreed Facts herein, to declare the rights of the respective parties with respect to the ownership of the mineral estate in and to the above described land, and to enter judgment declaring such rights accordingly and for such other and further relief and determinations as to the Court may seem proper in the premises.

Respectively submitted,

LAW OFFICES OF
JAMES M. BUTHOD

By: /S/ James M. Buthod
James M. Buthod
Attorney for Plaintiffs

McDONALD, McDONALD & NIXON

By: /S/ Charles R. Nixon
Charles R. Nixon
Attorney for Defendants

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Telephone: (812) 385-4816

STATE OF INDIANA)
) SS:
COUNTY OF GIBSON)

IN THE GIBSON CIRCUIT COURT
1978 TERM

EDEN H. POND	)	
EDNA H. BOBE	)	
CONSOLIDATION COAL COMPANY	)	CAUSE NO. C-78-17
Plaintiffs	)	ORDER ENTRY, JULY 25, 1978
vs.	)	
	)	Filed July 24, 1978
ULYSSES G. WALDEN, JR.	)	Russell Kern
CAROLYN SALLEE WALDEN	)	Clerk of the
Defendants	)	Gibson Circuit Court

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Section 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statute being I.C. 1971, 32-5-11-1 *et seq.*, is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare; even to the extent of impairment of private contract. *Home Building and Loan v. Blaisdell,* (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell, supra.*

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result in this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to someone who would exploit them, arguably for the common good.

Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell v. Burnson* (1971), 402 U.S. 535; *Mullvane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306; *Goldberg v. Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane, supra*? It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislative taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

/S/ Walter H. Palmer
WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

(Opinion of the Supreme Court of Indiana)

Short v. Texaco, Inc.

Cite as, Ind., 406 N.E.2d 625

Louise F. SHORT, Appellant,

v.

TEXACO, INC., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, De-Beers Diamond Investment, Ltd., Appellees,

State of Indiana, Intervenor.

Ulysses G. WALDEN, Jr. and Carolyn Sallee Walden, Appellants,

v.

Eden H. POND, Edna H. BOBE and Consolidation Coal Company, Appellees,

Louise F. Short, Intervenor.

Nos. 179S23 and 1278S303.

Supreme Court of Indiana.

June 23, 1980.

DeBRULER, Justice.

The trial court declared Ind. Code §§ 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral interest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

[1] Interests or estates in oil, gas, coal and other minerals

lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources.

[2] Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel v. Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the law-making power has either ignorantly or wilfully violated the constitution. To justify the Courts in declaring an act void, it must clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We affirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co. v. Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the

surface rights owner. That court relied upon *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra,* primarily relied upon by the trial court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * * * *
>
> An elementary and fundamental requirment of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. Burson, supra, relied upon by the trial court

does not support the conclusion either. There a Georgia law provided that the driver's license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggrieved parties in the accident report. In the course of holding this system violative of procedural due process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted). It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell*, a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co. v. Railroad Commission*, (1962) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

[3] The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an

opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson National Bank v. Luckett*, (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do not find the case of *Chicago & North Western Transportation Co. v. Pedersen, supra,* persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

[4, 5] The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman v. State ex rel. Department of Natural Resources,* (1979) Ind. App., 387 N.E.2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society . . . Property rights are not absolute and may be restricted by legislation which constitues a proper exercise of the State's police power . . . Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed . . . The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interests are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of

limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is free of the mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown v. Anderson*, (1833) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp. v. Donaldson*, (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love v. Lynchburg National Bank and Trust Co.*, (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analogous to acts of limitation which vests title to real and personal property.

[6] Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins v. Barney's Lessee*, (1831) 5 Pet. 457, 8 L.Ed. 190, is an early case upholding the validity of a seven year limitation upon actions to recover possession of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it

> existed in a state of nature, and is only modified by society, according to the discretion of each commodity."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

[7, 8] In *Terry v. Anderson*, (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie v. Wilson*, (1959) 240 Ind. 188, 162 N.E. 2d 79; *Sansberry v. Hughes*, (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner v. People of State of New York*, (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for non-payment of taxes would be conclusively presumed regular six months after the effective day of the statute was

upheld as providing a reasonable period for bringing an action. Pursuant to Ind. Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a reasonable time as contemplated by these cases.

In *Wilson v. Iseminger*, (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents, after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

[9] The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

[10] The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art.

I, § 21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interest under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler v. Hilt,* (1936) 209 Ind. 541, 200 N.E. 219; *Foreman v. State ex rel. Department of Natural Resources, supra.* Appellees point to *Evansville & Crawfordsville R.R. Co. v. Dick,* (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature has no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

[11] Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind. Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim without the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and in formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and pro-

fitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

[12] The Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al. v. St. Vincent Hospital, Inc. et al., Inc.*, 404 N.E.2d 585 (1980); *Setup, et al. v. Indiana Housing Authority, Inc.*, 402 N.E.2d 1215 (1980). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson v. Lee Optical of Oklahoma*, (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 464, 99 L.Ed. 563; *Indiana Aeronautics Com'n v. Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 42, 423, [72 S.Ct. 405, 407, 96 L.Ed. 469] (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511.

There has been no demonstration made which convinces us that the classification of Ind. Code § 32-5-11-5 is invidiously dis-

criminatory of wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

GIVAN, C. J., and HUNTER, PRENTICE and PIVARNIK, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 80-1018

Eden H. Pond, Edna H. Bobe and
Consolidation Coal Company,
Appellants.

v.

Ulysses G. Walden, Jr., et al.

APPEAL from the Supreme Court of Indiana.

The Statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

The case is consolidated with case No. 80-065, Texaco, Inc., et al. v. Louise F. Short, et al., and a total of one hour is allotted for oral argument.

March 23, 1981

Office-Supreme Court, U.S.
FILED
JAN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDEN H. POND,
ENDA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Now comes the appellees, Ulysses G. Walden, Jr. and Carolyn Sallee Walden, and the intervenor Louise F. Short, and moves this court to dismiss or in the alternative to

affirm the decision of the Indiana Supreme Court on the ground that there is no substantial federal question.

REASONS FOR AFFIRMANCE

There is no substantial federal question involved in this case. The statute here held constitutional is a marketable title statute and it operates in a manner similar to other kinds of marketable title statutes which have been upheld from almost the beginning of our legal system.

It provides for the termination of interests which have been split off from the residuary interest in land. Termination occurs because the owner of the interest has failed to manifest a desire to maintain his interest for a long period of time. When termination occurs the interest is reunited with the residual interest in the land.

These kinds of statutes reflect several basic policy objectives. Their primary purpose is to prevent interests in land from being held for long periods of time by people who aren't deriving any benefit from such ownership. Such persons tend to get out of hand and unlocatable. When title questions are raised, or the property becomes valuable, it is difficult to develop or trasfer the land because the owner of such interest can't be found. Statutes such as this are needed to keep land titles marketable. See Street, *Need for Legislation to Eliminate Dormant Mineral Interests*, 42 Mich St., B.J. 49 (March 1963); Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, VII Land and Water L.R. (1972).

A second policy objective no doubt also involves the expectations which are developed by those who live upon and utilize the land without disturbance by those whose rights depend upon a fragmentation of the title which occurred years earlier. This was eloquently expressed by Mr. Justice Holmes in defending the operation of statutes of limitations. He said:

> Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings and when the roots have

> grown to a certain size, cannot be displaced without cutting at his life. (Lerner, *The Mind and Faith of Justice Holmes*, 417 (1953))

There are many kinds of statutes which have served these same policy objectives and they have been upheld almost without exception. Statutes of limitations are a prime example. When an owner of land fails to assert his rights against a trespasser for a prescribed period the result is a transfer of title to the trespasser. The owner of land has lost his interest because he has failed to act in a timely manner to preserve it. There is no requirement of a hearing with notice and right to be heard prior to the loss of rights. The statute is self executing. Procedural due process does not become a question until and unless a dispute arises as to the existence of the facts which brought the statute into operation. Nor was there any requirement, as is suggested by the appellant and by the cases cited by appellant from Illinois, Wisconsin, Minnesota and Nebraska, *(Wilson v. Bishop*, (1980 ILL.) 412 N.E.2d 522; *Chicago and N.W. Trans. Co. v. Pederson*, 80 Wis. 2d 566, 259 N.W. 2d 316; *Contos v. Herbst* (Minn. 1979), 278 N.W.2d 732, *Wheelock v. Heath* (1978) 201 Neb. 835, 272 N.W.2d 768), that the legislatures which initially enacted statutes of limitations serve personal notice upon every landowner in the state in order for the statute to be operative with respect to his/her land. See *Jackson v. Lamphire*, (1830) 28 U.S. 280.

Recording acts also represent an effort to keep titles marketable and they also operate in a manner similar to the statute involved in this case. A title is terminated because of a failure to record ones' title document, and once again the statute is self executing. When the facts specified in the act occur the title is lost. *Jackson v. Lamphire* (1830) 28 U.S. 280.

Many states have also adopted statutes which terminate certain kinds of future interests. A typical statute is the Illinois Reverter act. 30 ILL. Rev. Stat. 37e et. seq. It provides that possibilities of Reverter can only last for a

period of fifty years and are then terminated. The act is applicable to existing interests which were created more than 50 years before its passage. It was held to be valid. No notice and hearing were provided nor did anyone contend they were necessary. *Trustee of Schools v. Batdorf* (1955) 6 ILL. 2d 486, 130 N.E.2d 111. See also *Hiddleston v. Neb. Jewish Ed. So.* (1911) 186 Neb. 786, 186 N.W.2d 904.

The various marketable title statutes are more clearly analogous to the statute involved here. In fact they operate on mineral interest in the same manner and for much the same reason. The marketable title acts terminate interests which are inconsistent with a root of title which has been of record for a specified period. (See e.g., Ind. Code 32-1-5-1 et. seq., which provides for a 50 year period). They terminate interests which have been fragmented off from the fee, including mineral interests, if there is a conveyance of the fee which does not except them, which has been of record for a prescribed period, unless the fragment has been the subject of a conveyance recorded within that period of time. *Uniform Acts, Land Transactions, Simplification of Land Transfers, Condominiums*, 223 West Pub. Co. 1978. Thus, if the minerals were severed from the surface in 1910 and the surface was transferred in 1915 in a conveyance which simply described the land, and made no mention of the minerals, the presence on the record of the 1915 conveyance for the prescribed period would terminate the mineral interest unless the mineral interest was, itself the subject of a recorded conveyance within that period. The mineral interest is terminated when the facts specified in the act coexist and the act makes no provision for notice and hearing. The Model Marketable Title act has been adopted in a great many states and it has been upheld whenever challenged. See e.q., *City of Miami v. St. Joe Paper Co.* (Fla. 1977), 347, So.2d 622.

Statutes similar to the one involved in this case have also been upheld against constitutional attack. Statutes in Virginia (Va. code §§55-154 and 55-155), Michigan (Mich.

Comp. Laws 554.291 et seq.) and Georgia (Ga. code §85-407.1) which have the same objectives as the act in the instant case have been upheld. *Love v. Lynchburg Nat. Bank* (1965) 205 VA 860, 140 S.E.2d 650; *Nelson v. Bloodworth* (Ga. 1977) 232 S.E.2d 547; *Van Slooten v. Larsen* (Mich. Sup. Ct. Docket #62256, decided Dec. 23, 1980). A statute in Florida which was very similar to the one in the instant case, except that it did not provide for a grace period for interests as to which the period had expired prior to the effective date of the act, was struck down because of the absence of the grace period but the Florida court expressed the opinion that it would have otherwise passed constitutional muster. *Trustees of Tufts Coll. v. Triple R Ranch, Inc.* (Fla. 1977) 275 So.2d 521.

In Louisiana a provision of the civil code which long predated the existence of a mineral industry in that state was held applicable to mineral interests. See Art 789 and 3546 West LA. Civ. Code Anno. (1953), (now Wests LSA Rev. Stat. §31:74 and Wests LSA Civ. Code Art. 753). That codal provision related to easements and it was held applicable because Louisiana characterized mineral interests as incorporeal interests. *Frost Johnson LBR Co. v. Sallings Heirs* (1920) 150 LA 756, 91 So. 207. (In fact so do many other states including Indiana). The codal provisions, which apply a doctrine known as liberative prescription operate to terminate any mineral interest which is non productive for a period of ten years. There is no provision for extending an interest by filing a document as is true in Indiana. The theory seems to be that the servient (surface) owners use of the surface is adverse to that of the dominant (mineral) owner, and that use continued for ten years matures a right in the servient owners to be free of the burden imposed by the mineral interest. The estate is freed of the incorporeal interest. Judging from the decided appelate cases applying the doctine (which run into the hundreds) most mineral interests in Louisiana must be dependent upon the operation of the doctrine. Again it, and the amendments to it, are applied retroactively; see *Mire v. Hawkins* (La. 1965) 177 So.2d 795. It operates when the

requisite faces coexist; and there is no notice or hearing provision.

In California the Supreme Court adopted a rule very similar to the Indiana statute by judicial decision and it did so for the purpose of effecting the very same policy objectives. *Gerhard v. Stephens* (1968) 68 Ca. 2d 864, 69 Cal. RPTR 612, 442 P.2d 692, 714. The court there held that mineral interests could be found to be abandoned in favor of the surface owner if unused for a long period of time.

The statute in the instant case thus operates no differently than countless other statutes which have similar objectives. It proceeds upon a principle that is fundamental to our system. That principle is the self executing statute. Rights can be created, transferred or terminated because the facts specified in the law coexist. Most laws in our system operate on the basis of this principle. A great deal of the property in the United States is held by virtue of the operation of marketable title statutes which utilize that principle. It is here asserted, however, that because the Indiana Supreme Court has applied that principle in upholding a statute enacted by the States' Legislatures, this court ought to take jurisdiction and decide whether that statute violates the U.S. Constitution. The principle basis for the assertion is that State Supreme Courts in Illinois, Wisconsin, Minnesota and Nebraska have struck down similar statutes. It is not disputed that those courts have advanced the proposition which appellants are asserting here. They have held that statutes similar to the one involved here are invalid because of a denial of procedural due process. The Wisconsin court in *Chicago & N.W. Trans. Co., Pederson*, 80 Wis.2d 259 N.W.2d 316 said, for example:

> "In this case, the plaintiffs mineral rights will revert to the surface owner if they are not registered or taxes paid on them. At least the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid."

The Wisconsin court, and those following its lead, are clearly saying that a law cannot operate to create transfer, or terminate a right unless it makes provisions for an administrative type hearing in which the facts are found, upon the basis of which the statute is to operate. Such a proposition is, once again inconsistent with the manner in which our legal system has operated since its beginning. Most of our laws operate when the requisite facts come to coexist. If an individual desires to dispute the application of the law to him/her, he/she can have the facts determined by a court of law. It is only then that procedural due process becomes a factor. If the proposition advanced by appellants and the Illinois, Wisconsin, Minnesota, and Nebraska courts, is sustained by this court it will mean that most of the laws by which property are held in the country, certainly all of the judge made laws, are invalid. Indeed it will then mean that judges can no longer make laws unless they are given the power to set up administrative agencies to enforce them. Such a proposition is ridiculous and should not be the basis for this court's assuming jurisdiction.

There is certainly nothing in the decisions of this court which supports the proposition here advanced. Most frequently cited in support of the proposition are cases such as *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, and *Mullane v. Central Hanover Trust Co.* (1950) 339 U.S. 306, 94 L. Ed. 865, 70 S.Ct. 652. In the Bell case the adversaries were the government and a citizen and the right being denied was one enjoyed by all persons similarly situated. In the Mullane case a final adjudication was being made without adequate notice. It is submitted that neither of these cases nor any cited by appellants establish a proposition so for reaching or unsettling as that advanced by appellants.

CONCLUSION

It is respectfully submitted that this appeal present no substantial federal question and should be dismissed or in the alternative affirmed.

Respectfully submitted,

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NO. 80-1018

Office-Supreme Court, U.S.
FILED
FEB 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The Appellees assert in their "Motion to Dismiss or in the Alternative to Affirm" that there is no substantial federal question involved in this case. Yet the Supreme Courts of the States of Illinois, Wisconsin, Minnesota and Nebraska have each held their respective states' dormant mineral legislation to be unconstitutional. *Wilson v. Bishop*, (Ill. 1980) 412 N.E.2d 522; *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W. 2d 316; *Contos v. Herbst*, (Minn. 1979) 278 N.W.2d 732; *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768. The Supreme Courts of Indiana - - in the present case - - and Michigan have held their respective dormant mineral legislation to be constitutional. *Short v. Texaco, Inc.*, (1980) ____ Ind. ____, 406 N.E.2d 625; *Van Slooten v. Larsen*, (Michigan Supreme Court Docket No. 62256, decided December 23, 1980). All six of these cases have been decided within the last three and one half years, with three of the decisions rendered within the last six months. The large number of states which have enacted this type of legislation, the litigation which this body of legislation has generated, and the division among the Supreme Courts of the various states on the constitutionality of such legislation all indicate the substantial importance of the questions raised by this appeal. Until this Court addresses the issue of what constitutional guidelines and parameters are applicable to this type of legislation, the legitimacy and constitutionality of this type of legislation will continue to be litigated, thereby hampering the effectiveness of such legislation and impairing future legislative efforts in this area.

The Appellees' argument that the Indiana Dormant Mineral Act satisfies strong policy objectives does not address the constitutional objections mised in the Appellants' Jurisdictional Statement. Not only must dormant mineral legislation have a valid police power objective, it must also satisfy the constitutional dictates of the due process clause, the contract clause, and the equal protection clause of the U. S. Constitu-

tion. No matter how laudable the end, the means to that end must be constitutional. The primary question presented by this body of legislation is not whether it has valid policy objectives, but whether it conforms to the requirements of the Constitution in its efforts to obtain these policy objectives. For the reasons set forth in the Jurisdictional Statement filed herein, the Indiana Dormant Mineral Act does not conform to the dictates of the United States Constitution in its efforts to achieve these policy objectives.

Appellees argue that dormant mineral legislation is similar to marketable title acts, statutes of limitation, and recording acts, and speculate that if this Court declares dormant mineral legislation unconstitutional, it will also have to declare unconstitutional these other types of legislation. The Supreme Courts of Illinois and Minnesota had no difficulty distinguishing between statutes of limitation and dormant mineral acts. *Wilson v. Bishop*, (Ill. 1980) 412 N.E.2d 522, 526; *Contos v. Herbst*, (Minn. 1979) 278 N.W.2d 732, 745. In addition, the Supreme Court of Minnesota in *Contos v. Herbst, supra*, p. 744, found no analogy between dormant mineral legislation and marketable title legislation. This is particularly enlightening in view of the fact that the Minnesota Supreme Court previously upheld the Minnesota Marketable Title Act in the case of *Wickelman v. Messner*, (1957) 250 Minn. 88, 83 N.W.2d 800, which is considered one of the leading cases in the country on the question of the constitutionality of marketable title legislation.

Furthermore, the Supreme Courts of Illinois and Nebraska, which had previously upheld the constitutionality of statutes terminating possibilities of reverter [*Hiddleston v. Nebraska Jewish Education Society*, (1971) 186 Neb. 786, 186 N.W.2d 904; *Trustee of Schools v. Batdorf*, (1955) 6 Ill.2d 486, 130 N.E.2d 111], subsequently held their respective states' dormant mineral legislation to be unconstitutional. *Wilson v. Bishop, supra; Wheelock v. Heath, supra.*

There are substantial reasons why the Supreme Courts of Illinois, Minnesota, Wisconsin and Nebraska found no analogy between dormant mineral legislation and remedial legislation - - statutes of limitation, marketable title acts, and

recording legislation. Statutes of limitation are in aid of the record title owner, and not in derogation of the rights of the record owner. Statutes of limitation, recording acts and marketable title acts are remedial, protecting the owner of record of an estate in land against stale, spurious or doubtful claims arising prior to the commencement of the statutory period or against unknown or hidden claims. Such acts apply separately to the respective mineral and surface estates, protecting the owners of each. Statutes of limitation and marketable title acts are in aid of the record title owner, whether of the surface or mineral estate or the entire fee. Dormant mineral legislation is in derogation of the rights of the record owner. Dormant mineral acts purport to void the effect of a conveyance which would itself constitute an effective root of title to the mineral estate under a marketable title act. Not only is there no analogy between dormant mineral acts and remedial type acts, there is a direct and inescapable conflict as to the purpose, principal and rationale of the two. These remedial acts are meant to aid the record title owner and assist in removing clouds upon that title. Dormant mineral legislation is meant to take the valid and unchallenged ownership of a real property interest from the rightful owner thereof. It does not remove clouds on the title to property, but actually creates an adverse claim and a cloud on that title.

The only constitutional question which the Appellees address in their Motion to Dismiss or Affirm is whether the Indiana Dormant Mineral Act conforms to procedural due process requirements. They do not discuss the three other constitutional objections to the Act raised in the Appellants' Jurisdictional Statement: 1) that the Act constitutes an impairment of contract in violation of the contract clause of the U. S. Constitution, Article I, Section 10; 2) that it violates the equal protection clause of the 14th Amendment of the U. S. Constitution by creating an arbitrary classification; and 3) that it violates the due process clause, Section 1 of the 14th Amendment of the U. S. Constitution, by taking private property without compensation.

The Appellees argue in their Motion to Dismiss or Affirm

that the Indiana Dormant Mineral Act does not violate procedural due process requirements of the 14th Amendment because it is a self-executing statute. This argument evades the questions before the Court in this case. The fact that the Indiana Dormant Mineral Act is self-executing does not shield the Act from due process scrutiny. On the contrary, the fact that it is self-executing - - not providing notice and a hearing to the owner of the mineral interest at some meaningful time - - makes the Act more constitutionally defective. This Court has steadfastly required that notice and a hearing be provided at some meaningful time whenever a property interest is taken. While this Court has held that it is not always necessary to have a hearing prior to the taking of a property interest, there must at least be a hearing immediately following the taking of the property interest. *Mackey v. Montrym*, (1979) 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321, *Barry v. Barchi*, (1979) 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365. Since the owner of the mineral interest is not required to be given notice of the taking and is not provided with a judicial hearing to challenge the facts surrounding that taking, the possibility of error is substantial. This possibility of error is further increased by the fact that the person who makes a determination of whether or not there has been a use made of the mineral interest - - which would preserve the interest pursuant to the Act - - is the reversionary interest claimant, the very person who would most directly gain by the lapse of the mineral interest. This can hardly be considered a fair, just and impartial determination of the facts in compliance with procedural due process.

The Court should note probable jurisdiction of this appeal.

Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1018

IN THE

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October Term, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY, - Appellants,

versus

ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - Appellees,

LOUISE F. SHORT, - - - - - - Intervenor.

On Appeal from the Supreme Court of Indiana

BRIEF OF APPELLANTS

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THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute retroactively provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

a) Whether the Indiana Mineral Lapse Act constitutes a taking of private property without compensation in violation of the due process clause since no compensation is given to the owner of the severed mineral interest upon the lapse of this interest pursuant to the statute.

b) Whether the Indiana Mineral Lapse Act violates procedural due process protections by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract by voiding contractual conveyances of mineral interests, where no overriding public interest justifies the methods used in transferring ownership of the mineral interest.

d) Whether the provision in the Indiana Mineral Lapse Act — which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county — violates the equal protection clause.

THE PARTIES TO THE PROCEEDING

All of the parties to the proceeding are shown in the caption with the exception that the Attorney General for the State of Indiana is also a party to this Appeal.

The present case has also been consolidated by this Court with the case, *Texaco, Inc., et al.* v. *Louise F. Short, et al.*, No. 80-965, which also challenges the constitutionality of the Indiana Mineral Lapse Act.

THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute retroactively provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

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b) Whether the Indiana Mineral Lapse Act violates procedural due process protections by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract by voiding contractual conveyances of mineral interests, where no overriding public interest justifies the methods used in transferring ownership of the mineral interest.

d) Whether the provision in the Indiana Mineral Lapse Act — which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county — violates the equal protection clause.

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No. 80-1018

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October Term, 1980

EDEN H. POND,
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ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - - *Appellees,*

LOUISE F. SHORT, - - - - - *Intervenor.*

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OF APPELLANTS

REFERENCE TO THE OPINION BELOW

The Supreme Court of Indiana combined the present case with the aforementioned case of *Short* v. *Texaco, et al.,* for purposes of its opinion. This opinion is reported as *Short* v. *Texaco,* (1980), ____ Ind. ____, 406 N. E. 2d 625. It is reprinted in the Joint Appendix, pages 37 to 49.

The unreported "Memorandum Opinion and Judgment on Agreed Case" entered by Judge Walter Palmer, Judge of the Gibson County Circuit Court, dated July 24, 1978, is reprinted in the Joint Appendix, pages 33 to 36.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Indiana, declaring constitutional the Indiana Statute, Indiana Code 32-5-

11-1 through 32-5-11-8, commonly known at the Indiana Mineral Lapse Act, was entered on June 23, 1980.

A petition for rehearing, timely filed, was denied by the Supreme Court of Indiana on September 24, 1980.

A Notice of Appeal to this court was duly filed in the Supreme Court of Indiana on December 5, 1980.

This Appeal was docketed in this court on December 19, 1980, which was within ninety (90) days from the denial of rehearing below. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, Subparagraph 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

14th Amendment, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 10, United States Constitution:

"No state shall enter into any treaty, alliance or a confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility."

The Indiana Code 32-5-11-1 through 32-5-11-8: (Printed in Appendix "A")

STATEMENT OF THE CASE

The action at bar was filed in the Circuit Court of Gibson County, Indiana, as an Agreed Case, with an Agreed Statement of Facts, pursuant to an Indiana Statute, Indiana Code 1971, Section 34-1-29-1 and following. The parties stipulated that the sole issue for determination by the trial court was whether the Indiana Mineral Lapse Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, was constitutional under the Constitution of the United States and the Constitution of the State of Indiana. All of the questions set forth in the section of the Jurisdictional Statement entitled "The Questions Presented for Review" were first raised and presented to the trial court. The Agreed Statement of Facts, as found on pages 4 to 29 of the Joint Appendix, may be summarized as follows:

On March 1, 1954, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners as tenants in common of an eighty acre tract of land in Gibson County, Indiana. On that date, they conveyed by Warranty Deed this eighty acre tract to Ulysses Walden and Mildred Walden, his wife. This Warranty Deed contained a reservation of the total mineral estate by the grantors, Clara M. Haper, Eden H. Pond and Edna H. Bobe.

On August 13, 1959, Ulysses G. Walden and Mildred Walden conveyed by Warranty Deed to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife, a seventy-nine acre tract of land which was part of the aforementioned eighty acre tract.

About the year 1958, Clara M. Haper died intestate leaving as her sole and only heirs her daughters, Eden H. Pond

and Edna H. Bobe, who succeeded to the interest of Clara M. Haper in the severed minerals under the eighty acre tract.

On June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as lessors, made, executed and delivered to Consolidation Coal Company, as lessee, a coal mining lease covering forty acres of the aforementioned seventy-nine acre tract. On March 4, 1977, Ulysses Grant Walden, Jr., and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On the same date, March 4, 1977, there was published in the Princeton Daily Clarion, a daily newspaper in Gibson County, Indiana, a notice of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On May 27, 1977, Charles R. Nixon, as Attorney for Ulysses Grant Walden, Jr., sent a notice to Consolidation Coal Company of the claim of his client, Ulysses Grant Walden, Jr.

On January 12, 1978, the Agreed Statement of Facts [Complaint] was filed in the Circuit Court of Gibson County, Indiana. It was stipulated by Eden H. Pond and Edna H. Bobe that they had made no use of the mineral interest as defined by the Mineral Lapse Act, and had not filed a Statement of Claim with the Recorder of Gibson County, Indiana, setting forth their ownership of the mineral interest. It was further stipulated by the parties that the sole question for determination by the trial court was whether the Indiana Mineral Lapse Act is constitutional under the Constitution of the United States and the Constitution of the State of Indiana. If the statute is unconstitutional, Eden H. Pond and Edna H. Bobe are the owners of the mineral interest in and under the subject property.

If the Mineral Lapse Act is constitutional, the owners of the mineral interest pursuant to the statute are Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife.

Pursuant to an Indiana statute, the Attorney General of the State of Indiana was notified during the lawsuit that the constitutionality of a state statute was being questioned. The Attorney General entered his appearance in the action and submitted trial briefs on the question of the constitutionality of the act. In addition, Louise F. Short filed a Petition to Intervene in the action and such petition was granted by the court. After the questions regarding the constitutionality of the Indiana Mineral Lapse Act were fully briefed and oral argument was heard, the Trial Court rendered its "Memorandum Opinion and Judgment on the Agreed Case" on July 24, 1978, holding that the Indiana Mineral Lapse Act was unconstitutional. (Joint Appendix, pages 33 to 36).

Several weeks after the trial court's opinion and judgment in the present case, the trial court issued its judgment in another case that was pending in the Gibson Circuit Court involving the constitutionality of the Indiana Mineral Lapse Act, which case was styled *Louise F. Short* v. *Texaco, Inc., et al.,* and which has been consolidated with the present case by this Court. The *Short* case involved oil and gas mineral interests only. The trial court held that the Indiana Mineral Lapse Act was also unconstitutional as it applied to oil and gas mineral interests.

Constitutional questions being involved, pursuant to the Indiana Rules of Appellate Procedure, a direct appeal was taken from the trial court judgment to the Supreme Court of Indiana. Again, all the questions presented in this appeal were raised, briefed and argued before the Supreme Court of Indiana. The Attorney General of the State of

Indiana was a party to the appeal and represented the State of Indiana on the question of the constitutionality of the Act. *Short* v. *Texaco* was also appealed directly to the Supreme Court of Indiana. The Supreme Court of Indiana combined the present case with *Short* v. *Texaco* for purposes of oral argument and opinion.

On June 23, 1980, the Supreme Court of Indiana issued a joint opinion in the two cases — the present case and *Short* v. *Texaco* — reversing the Trial Court and declaring that the Indiana Mineral Lapse Act was constitutional. (Joint Appendix, pages 37 to 49). Petition for Rehearing was timely filed with the Supreme Court of Indiana, which petition was denied on September 24, 1980.

SUMMARY OF THE ARGUMENT

The Indiana Mineral Lapse Act is unconstituional and void for the following reasons:

1. The Indiana Mineral Lapse Act violates the Fourteenth Amendment of the United States Constitution by taking a very valuable property interest without providing due process protections to the owner of the severed mineral interest. Without question, a mineral interest is a property right protected by the due process clause of the Fourteenth Amendment. By providing for the transfer of the severed mineral interest from the record owner to another entity (usually the surface owner), a taking of property by the state is effected. Yet the Indiana Mineral Lapse Act makes no provision for notifying the owner of the severed mineral interest that his valuable property right is being taken. There is not even a requirement that the owner of the severed mineral interest be notified after the severed mineral interest has been taken. No provision is made in the

Mineral Lapse Act for a hearing in which the owner of the severed mineral interest might contest the taking of his mineral interest. This is not a situation in which the Court need determine whether a pretermination hearing is necessary or whether a prompt post-termination hearing is adequate, because the Mineral Lapse Act has no provision for a hearing at any time. Finally, the Mineral Lapse Act makes no provision for compensating the owner of the severed mineral interest for the taking of his valuable property rights which is clearly required under the Fifth and Fourteenth Amendment due process clauses.

The Indiana Mineral Lapse Act is not analogous to statutes of limitations, marketable title acts or recording legislation. Statutes of limitations, recording acts and marketable title acts are remedial, protecting the owner of record of an estate in land against stale, spurious or doubtful claims arising prior to the commencement of the statutory period or against unknown or hidden claims. Statutes of limitations and marketable title acts are in aid of the record title owner, whether of the surface or mineral estate or the entire fee. Dormant mineral legislation is in derogation of the rights of the record owner. Dormant mineral legislation is intended and in fact does take substantive property rights, being the total ownership of the mineral estate. Statute of limitations and marketable title acts merely limit the procedural remedies available to one challenging record ownership. Furthermore, remedial acts are meant to aid the record title owner and assist in removing clouds upon that title whereas dormant mineral legislation is meant to take the valid unchallenged ownership of a real property interest from a rightful owner.

2. The Indiana Mineral Lapse act also places a severe impairment on contractural rights without using the means

and methods appropriate to the nature and purpose of the legislation. In the present case, the reservation of the mineral estate in the Warranty Deed of March 1, 1954, constituted a contract between the parties to the conveyance and created on-going rights and duties with respect to the reservation of the mineral estate. The Indiana Mineral Lapse Act severely, in an unanticipated and retroactive fashion, changes the obligations of the parties to the contract by requiring certain uses of the property be made or a statement of claim filed, which if not done, leads to complete destruction of the contract. There has been no showing of any emergency need to justify this severe impairment of contractural rights. Furthermore, the legislation was not appropriately tailored to the purpose for which it was designed to met.

3. The Indiana Mineral Lapse Act violates the equal protection clause of the Fourteenth Amendment by creating a classification which makes it mandatory that notice be given to a small special interest group, before the lapse of the mineral interest occurred, while not requiring that notice be given to all other severed mineral interest owners affected by the Act, who are in similar need of such protection. The Mineral Lapse Act creates a classification which provides due process notice to a small special interest group, while depriving all other owners of severed mineral interest this basic constitutional right. Even if this Court would view this classification as being of a social or economic nature, thus utilizing a low level scrutiny test, the classification must be considered arbitrary and capricious.

ARGUMENT

I. INTRODUCTION

Under Indiana law, as in all common law jurisdictions,[1] it is possible to separate or sever the mineral ownership in real estate from the ownership of the surface. With the passage of time, it is possible for the severed mineral estates to become fractionalized, making it potentially difficult to identify and locate the owners. This can impede the development of the mineral estate.[2] In response to this perceived problem, a number of state legislatures have enacted what are commonly called dormant mineral statutes. These statutes are of two general types: (1) recordation statutes which require specified severed mineral owners to register their interests, with the failure to register resulting in the merger of the mineral estate with the surface or forfeiture to the state; and (2) statutes imposing specific requirements — such as specified uses of the minerals, actual production, taxation or registration — which if not satisfied within a set period of time, will cause the severed mineral estate to merge with the surface estate.

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[1]See Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 Land and Water L. Rev. 73, 73-74 (1972).

[2]For commentaries on this problem *see*, Hardy, *Ancient Mineral Claims — An Obstacle to Development*, 28 Ann. Inst. on Oil & Gas L & Tax 137 (1977); Kurtz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 Ann. Inst. on Oil & Gas L. & Tax 81 (1971); Outerbridge, *Missing and Unknown Mineral Owners*, 25 Rocky Mtn. Min. L. Inst. 20-1, 20-57 (1979).

The states of Minnesota,[3] Wisconsin[4] and South Dakota[5] have enacted the first type of dormant mineral legislation. Illinois,[6] Indiana,[7] Michigan[8] and Nebraska[9] have enacted the second type of dormant mineral legislation.

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[3]Minn. Stat. Ann. §§ 93.52 to 93.58 (West 1977, Supp. 1979). This statute required the owner of the severed mineral interest to file a verified statement of ownership with the register of deeds, and pay a yearly tax. Failure to substantially conform to the statute caused the severed mineral interest to forfeit to the state. Act amended in 1979, *Minn. State. Ann.* § 93.55(1) to require notice and a hearing prior to forfeiture.

[4]Wis. Stat. Ann. § 700.30 (West Supp. 1979). Under the Wisconsin statute the owners of severed mineral rights were required to record the severance instrument with the register of deeds of the county within three years from the date of the act or the date of the instrument, whichever was later. Failure to record within this time period caused the mineral interests to revert to the surface fee owner. In addition, the statute required payment of an initial, and thereafter an annual, registration fee to preserve the mineral rights. Failure to pay such registration fees within three years from the due date also resulted in the reversion of the mineral interests to the surface fee owner.

[5]S.D. Codified Laws Ann. § 43-30-8.1 (Supp. 1979). This statute requires that one claiming a severed mineral interest record an instrument describing that interest with the register of deeds at least once every ten years, or it will merge with the surface estate.

[6]Ill. Ann. Stat. ch. 30, §§ 197, 198 (Smith-Hurd Supp. 1980). The Illinois statute required production of the severed oil and gas mineral interests or written notice recorded with the county recorder's office within 25 years after its creation, or the mineral interest would be deemed abandoned. Ownership would then vest in the surface owner. There was a three year grace period after the effective date of the Act to produce oil and gas or file the written notice.

[7]Ind. Code Ann. §§ 32-5-11-1 to 32-5-11-5 (Burns 1973).

(Footnotes continued on next page)

Six of the above dormant mineral acts have been constitutionally challenged in each state's highest court. The Illinois,[10] Minnesota,[11] Nebraska[12] and Wisconsin[13] statutes were found to be unconstitutional in some way, while the Indiana[14] — in the present case — and Michigan[15] statutes were upheld.

(Footnotes continued from preceding page)

[8]Mich. Comp. Laws Ann. §§ 554.291 to 554.294 (1967). The Michigan statute requires the owner of an oil and gas mineral interest to make certain statutorily defined uses of the property or record a notice of interest with the register of deeds, within 20 years of the creation of the severed interest, or else the mineral interest is deemed abandoned, with a reversion to the surface owner. There is a three year grace period immediately following the effective date of the Act given to the mineral interest owners allowing them to record notices preserving their interests.

[9]Neb. Rev. Stat. §§ 57-228 to 57-231 (1978). The Nebraska statute applied to all severed mineral interests and provided that the owners of the surface could bring an action seeking a termination and extinguishment of the severed mineral inteersts, naming as party defendants all persons having or appearing to have an interest in the severed mineral interests. The severed mineral interests would be deemed abandoned if for a period of 23 years prior to the filing of the lawsuit, certain statutorily defined uses of the property had not been made or a verified claim of interest recorded. There was also a two year grace period after the effective date of the statute in which the severed mineral interest owner could assert his claim.

[10]*Wilson* v. *Bishop*, (1980) ____ Ill. 2d ____, 412 N. E. 2d 522.

[11]*Contos* v. *Herbst*, (Minn. 1979) 278 N. W. 2d 732, 740, appeal dismissed sub. nom. *Prest* v. *Herbst*, 444 U. S. 804.

[12]*Wheelock* v. *Heath*, (1978) 201 Neb. 835, 272 N. W. 2d 768.

[13]*Chicago & N.W. Transp. Co.* v. *Pedersen*, (1977) 80 Wis. 2d 566, 259 N. W. 2d 316.

[14]*Short* v. *Texaco*, (1980) ____ Ind. ____, 406 N. E. 2d 625.

[15]*Van Slouten* v. *Larsen*, (1980) ____ Mich. ____, 299 N. W. 2d 704.

II. LEGISLATIVE HISTORY OF INDIANA ACT

The Indiana Dormant Mineral Act, or Mineral Lapse Act, Indiana Code Section 32-5-11-1 through 32-5-11-8, was enacted by the Indiana Legislature in 1971. (Pub. L. No. 423 [1971] Ind. Laws 1970). The principal draftsman of the Act was Ronald W. Polston, a professor of law at Indiana University-Indianapolis Law School.[16] While there is little legislative history regarding the Act, Professor Polston did author a law journal article in 1972 in which he proposed the Indiana Act, with modifications, as a model for dormant mineral legislation.[17] Professor Polston discussed the legislative background to the passage of the Indiana Act in this article.[18]

Professor Polston argued that severed mineral interests whose present owners cannot be ascertained create a title problem which hinder mineral development.[19] The Indiana Mineral Lapse Act was proposed and drafted with the intent of changing the common law in Indiana as it applied to severed mineral interests in an attempt to place the severed mineral interests back into the stream of commerce.[20]

For purposes of this argument, a challenge is not made to this asserted public purpose behind the Act, although a strong difference of opinion exists as to the need for such legislation. *See* Outerbridge, *Missing and Unknown Mineral Owners,* (1979) 25 Rocky Mtn. Min. L. Inst., 20-1,

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[16]Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev. 73 (1972), *see* footnote 59, page 90.

[17]*Id.*

[18]*Id.*

[19]*Id.* at 74.

[20]*Id.* at 74.

20-57. However, this case does challenge the means and methods used to accomplish this purpose as not complying with the constitutional dictates of due process, the contract clause and equal protection.

III. RELEVANT PRINCIPLES OF INDIANA MINERAL LAW

As previously stated, it has long been held at common law in Indiana, as in all common law jurisdictions, that a separate legal mineral estate or a separate interest in minerals may be created independent of the ownership of the land itself. *Heller* v. *Dailey*, (1902) 28 Ind. App. 555, 63 N. E. 490. This principle as it applied to oil and gas interests in land was also codified by the Indiana legislature in Indiana Code 32-5-7-3.[21] The severance of the minerals from the surface creates two estates,[22] of equal dignity, each a freehold estate of inheritance that may be

[21]Indiana Code 32-5-7-3. Nature of Estates. — Interests in the oil and gas in or on or under or that may be taken from beneath the surface of lands lying within the state may be created for life, for a term of years, or in fee, in such manner and to such extent as are all other interests in real estate; and title to such estate may be vested in one or more persons, by sole ownership, tenancy in common, joint tenancy, tenancy by the entireties, or in such other manner as may be now or hereinafter recognized in the law of this state. Such interests or estate shall be freely alienable, in whole or in part, and in like manner as are other interests in real estate.

[22]Indiana Code 32-5-7-3. Also, the Supreme Court of Indiana in its opinion, Joint Appendix pages 38 to 39, stated:

> "Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership."

conveyed separately thereafter.[23] The severed mineral estates are considered to be interests in real property.[24]

Not only is it true that separate legal mineral estates may be created in all the minerals on, in or under particular parcels of land, Indiana has further held that coal and other solid minerals are corporeal hereditaments. *Heller* v. *Dailey, supra,* 63 N. E. at 492-493; *Monon Coal Company* v. *Riggs,* (1944) 115 Ind. App. 236, 56 N. E. 2d 672, 57 N. E. 2d 598; *Halbert* v. *Hendricks,* (1950) 121 Ind. App. 43, 95 N. E. 2d 221; *Board of Commissioners of County of Sullivan* v. *Heap,* (1973) 115 Ind. App. 633, 294 N. E. 2d 182. At common law, corporeal hereditaments cannot be abandoned.[25] Even if this was a property interest which could be abandoned, e.g. an incorporeal hereditament, there must be a concurrence of the intention to abandon the property and actual relinquishment of the property before an abandonment would occur. *Schaffner* v. *Benson,* (1929) 90 Ind. App. 420, 166 N. E. 881; *Hoeppner* v. *Slagle,* (1967) 141 Ind. App. 622, 231 N. E. 2d 51. It has further been held under Indiana law that mere nonusage does not show an intention to abandon. *Simpkin* v. *New York Central Railroad Company,* (1966) 138 Ind. App. 668, 214 N. E. 2d 661.

In addition, it has been held that a severed mineral estate cannot be obtained by adverse possession of the surface alone, and that mere nonusage of the minerals does not terminate the severed mineral estate. *McBeth* v. *Wetnight,* (1914) 57 Ind. App. 47, 106 N. E. 407, 410.

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[23]Indiana Code 32-5-7-3.

[24]*Id.*; see also *Heller* v. *Dailey, supra.*

[25]Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev. 73 (1972).

Therefore, prior to the effective date of the Indiana Mineral Lapse Act, being September 2, 1972, the severed mineral interest would not have been lost by the owners of the severed minerals, Eden H. Pond and Edna H. Bobe, on the theory of adverse possession or abandonment. Furthermore, at the time the mineral interest was reserved, being March 1, 1954, (Joint Appendix, pages 10 and 11) there was no common law or statutory requirement that use be made of the mineral interest in order to preserve the interest.

While the Indiana Mineral Lapse Act does not use language of abandonment as is the case in some dormant mineral acts of other jurisdictions,[26] it creates in effect a new criterion for abandonment, with retroactive application, requiring the owner of the vested mineral interest to make use of the mineral interest or file a statement of claim in order to avoid the presumption that the severed mineral interest was abandoned. Therefore, in the present case, the owners of the severed mineral interest, Eden H. Pond and Edna H. Bobe, who had no contractural, statutory, or common law obligation to use their mineral interest when that interest was created, find themselves in peril of losing this valuable, vested mineral interest in real property, by a statute which retroactively places an obligation on them to make a statutorily defined use of the property or file a statement of claim, without any notice or hearing being provided them to challenge the legitimacy of the lapse.

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[26]Ill. Ann. Stat., ch. 30, § 197 (Smith-Hurd Supp. 1980); Mich. Comp. Laws Ann., § 554.291 (1967); Neb. Rev. Stat. § 57-229 (1978).

IV. THE INDIANA MINERAL LAPSE ACT UNCONSTITUTIONALLY TAKES PROPERTY WITHOUT DUE PROCESS PROCEDURES BEING SATISFIED

Under the Indiana Mineral Lapse Act, persons who acquired mineral interests long before its passage, as did appellants herein, were automatically deprived of those interests if they had not performed certain specified acts during the 20 year period prior to the statute's passage and if they thereafter failed to register their interest in the property in the ensuing two years. Thus, the Indiana statute applies retroactively to property interests created prior to its passage. The difficulty or ease of performing those acts is of no significance here, because the statute provides no notice to mineral interest holders as to what is expected of them. It similarly provides no opportunity for them to appear in any forum, administrative or judicial, to declare their interest in their property or to show that they would have met the statute's requirements had they known of them. It does not even give them an opportunity to show that they did in fact meet the requirements of the Act.

As they did in the court below and as they reiterated in their opposition to appellants' jurisdictional statement, appellees will doubtless argue in this Court that the Indiana Mineral Lapse Act, as well as other similar statutes recently passed by other states, are necessary measures in an age of energy scarcity. Appellees will contend, as they have before, that the existence of severed mineral interests impairs the development of oil, gas, coal, and other resources, which could be more expeditiously extracted if clear title to such resources were conveyed to surface owners.

Again, we do not challenge these arguments, because we recognize that this Court is not the proper place to debate

the wisdom of a state statute. See e.g., *North Dakota State Board of Pharmacy* v. *Snyder's Drug Store, Inc.*, (1973) 414 U. S. 156, 164-167, 94 S. Ct. 407, 38 L. Ed. 2d 379. Our quarrel here is with the procedural aspects of the statute—i.e., the absence of any notice or hearing associated with its operation. At a time when this Court has required the States to provide notice and an opportunity to be heard even with respect to such matters as the temporary interruption of service provided by a public utility, *Memphis Light, Gas & Water Division* v. *Craft*, (1978) 436 U. S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30, it seems inconceivable that a state can deprive a person of a fee interest in real estate—the very core of the property rights protected by the due process clause—and yet fail to afford any notice or opportunity to be heard. See also *Matthews* v. *Eldridge*, (1976) 424 U. S. 319, 325 n.4, 96 S. Ct. 893, 47 L. Ed. 2d 18; *Goldberg* v. *Kelly*, (1970) 397 U. S. 254, 90 S. Ct. 1101, 25 L. Ed. 2d 287. Indeed, as we show in the following section, the Indiana statute's impact upon a mineral interest is so pervasive as to constitute a taking, which a state can achieve only if it observes the procedures required by the Fifth and Fourteenth Amendments.

A. The Act Takes Property Without Providing an Adequate Opportunity to Protect the Property Interest and Without Providing for Compensation.

The taking clause of the Fifth Amendment has long been recognized by this court as a limitation upon the power of the States:

> The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar "nor shall private property be taken for public use, without just compensation." That prohibition, of course,

applies against the States through the Fourteenth Amendment.

Webb's Fabulous Pharmacies, Inc. v. *Beckwith,* (1980) ____ U. S. ____, 101 S. Ct. 446, 450, 66 L. Ed. 2d 358. See *Chicago, B. & Q. R. Co.* v. *Chicago,* (1897) 166 U. S. 226, 239, 241, 17 S. Ct. 581, 41 L. Ed. 979.

The Indiana Mineral Lapse Act unquestionably affects a taking of private property. It takes the title to the property of one person and gives it to another because the State believes this transfer of ownership will more nearly conform with the State's policies.

There is no issue here of a "regulatory taking" where courts are asked to perform the often difficult task of establishing the line between regulation of the use of property and taking. See, e.g., *San Diego Gas & Electric Co.* v. *San Diego,* No. 79-678, slip op. at 14, n.15, (Brennan, Stewart, Marshall & Powell, JJ., dissenting). Here, the statute takes, in the words of *Andrus* v. *Allard,* (1979) 444 U. S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210, the "full 'bundle' of property rights" possessed by a mineral estate owner, not merely "one 'strand' of the bundle." In prohibiting the subsurface owner's "right to exclude" the surface owner from access to any oil, gas, coal, or other minerals underlying the real estate, it takes what is "universally held to be a fundamental element of the property right [that] falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States,* (1979) 444 U. S. 164, 179-10, 100 S. Ct. 383, 62 L. Ed. 2d 332 (footnote omitted).[27]

[27] Indeed, the Indiana statute goes beyond the taking condemned in *Kaiser Aetna,* since it gives the surface owner the right to exclude the mineral estate holder from the use of his own property.

Because the taking here is so clear-cut, relatively few modern cases are on point, there being only a limited number of cases that involve the taking of every vestige of ownership. But see *Armstrong* v. *United States*, (1960) 364 U. S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554. However, a number of cases that involve lesser invasions of property rights caused by the regulation of property demonstate *a fortiori* the unconstitutionality of the Mineral Lapse Act.

Pennsylvania Coal Co. v. *Mahon*, (1922) 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 332, recently described by this Court as the "leading case" in this area,[28] is instructive. *Mahon* also dealt with severed mineral interests and the conflicting claims of surface owners. There, a Pennsylvania statute prohibited the mining of coal by a mineral estate owner, if such activities threatened to cause subsidence that might endanger the surface owner. Although recognizing that the State could be concerned with public safety under such circumstances, the Court struck down the Pennsylvania statute, because "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Here, of course, the coal, oil or gas of the mineral estate owner has been appropriated and given to the surface owner.

Although rejecting taking claims advanced by the property owner, *Penn Central Transportation Co.* v. *City of New York*, (1978) 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 631, also supports the position of appellants here. In that case, the Court idenified "several factors that have

[28] *Penn. Central Trans. Co.* v. *New York City*, (1978) 438 U. S. 104, 127, *reh. denied*, 439 U. S. 883. See also *San Diego Gas & Electric Co.* v. *San Diego*, No. 79-678 (March 24, 1981), slip. op. at 13-14 (Brennan, Stewart, Marshall & Powell, JJ., dissenting).

particular significance" in determining whether Government activity constitutes a taking. *Id.* 438 U. S. at 124. As the first such factor, the Court referred to "the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interferred with distinct investment-backed expectations. . . ." *Id.* In the instant case, the Indiana statute destroys a property interest that is created solely for the pursuit of "investment-backed expectations."

The second factor referred to by the Court in *Penn Central* was drawn from

> . . . Decisions in which this Court has dismissed taking challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the Claimant to constitute property for Fifth Amendment purposes. *Id.* at 124-25.

Once again, this factor highlights the nature of the taking in this case. The lower court did not dispute that the mineral interest destroyed by the Indiana statute constitutes "property" as that term is used in both the Fifth and Fourteenth Amendments. To the contrary, the Indiana Supreme Court declared that the mineral interests affected by the challenged legislation are

> . . . interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are

> themselves of great utility and benefit to the society as a means of facilitating the development of natural resources. (Joint Appendix, page 39)

As an illustration of the final factor, the Court in *Penn Central* referred to "instances in which a state court reasonably concluded that health, safety, morals or our general welfare would be promoted by prohibiting particular contemplated uses of land," citing "zoning laws" as the "classic example" of the type of state regulation that usually pass constitutional muster. *Id.* 438 U. S. at 125. The Indiana statute cannot be so justified. Rather than prohibiting "particular contemplated uses of land," it completely destroys all of the mineral estate holder's interests. Moreover, it conveys these interests to the surface owner so that he or she may engage in precisely the same activity as the mineral estate owner—extraction of oil, gas, coal, or other minerals.

The principles of *Mahon* and *Penn Central* have been recently embraced by four or perhaps five members of this Court in *San Diego Gas & Electric Co.* v. *City of San Diego, supra,* No. 79-678 (March 24, 1981). In the dissenting opinion authored by Justice Brennan, joined by Justices Stewart, Marshall, and Powell, and described by Justice Rehnquist as stating principles with which he "would have little difficulty in agreeing" had he accepted the dissenting view that the opinion below was a final judgment ripe for Supreme Court review, these members of the Court agreed that a " 'taking' may also occur without a formal condemnation proceeding or transfer of fee simple." Slip op. at 15-16 (Brennan, Stewart, Marshall & Powell, JJ., dissenting). The dissent continues:

> In service of this principal, the Court frequently has found "takings" outside the context of similar con-

> demnation proceedings or transfer of fee simple, in cases where Government action benefiting the public resulted in destruction of the use and enjoyment of private property. *Id.* at 16.

On this basis, these Justices determined that a zoning ordinance of the City of San Diego that restricted the property owner's rights to construct a nuclear power plant on its property constituted a taking for which the government owed the utility just compensation.[29]

The principles fairly extracted from *Mahon*, *Penn Central*, and *San Diego Gas & Electric*, as well as other cases that condemn regulation that rises to the level of a taking, apply *a fortiori* here. In such cases nominal title is left in the property owner, but the owner is prevented from productively using its property. Here, in order to effect what Indiana considers to be a valid public policy, title is actually removed from the mineral estate owner and is transferred to the surface owner.

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[29]This recognition by the dissenters in *San Diego Gas & Electric* that a taking can occur through the exercise of a Government's regulatory authority, rather than through the explicit invocation of eminent domain powers, highlights a further error of the Indiana court. In reversing the trial court's judgment that the Indiana statute constitutes a taking of property without just compensation, the court stressed that "the state through this statute is not actually taking the mineral interest for its own use and benefit." 406 N. E. 2d at 631. The Court went on to observe that "the Mineral Lapse Act does not involve the injury to private property through conduct or activity of Government agents or others having or exercising the power of eminent domain." *Id.* The dissenters in *San Diego Gas & Electric* clearly rejected this view of the law of just compensation and eminent domain. While the Indiana Supreme Court's error in this regard was limited to its discussion of the Indiana Constitution, there can be no question but that it also permeated its view of the federal taking issues raised below.

That the direct beneficiaries of the Indiana statute are private parties, rather than the state itself, does not make it any less a taking. The same was true in *Mahon*. Moreover, the Court's recent opinion in *Northern Cheyenne Tribe* v. *Hollowbreast*, (1976) 425 U. S. 649, 96 S. Ct. 1793, 48 L. Ed. 2d 274, was premised upon the assumption that the transfer of title to severed mineral interests from one group of private parties to an Indian tribe pursuant to federal legislation would constitute a taking by the United States, if the person from whom these rights were taken had a vested interest in them. See *Id.* at 651-52. And in *Regional Rail Reorganization Act Cases*, (1974) 419 U. S. 102, 148-155, 95 S. Ct. 335, 42 L. Ed. 2d 320, this Court recognized that the statutorily directed transfer of railroad properties to Conrail—"basically a private, not a governmental, enterprise," *Id.* at 152—could "indeed be a taking of private property for public use." *Id.* at 155. See also *Berman* v. *Parker*, (1954) 348 U. S. 26, 33-34, 75 S. Ct. 98, 99 L. Ed. 27.

Finally, it is clear that the Indiana Mineral Lapse Act could not be justified as constituting a taking of property for private use only, since this type of taking is strictly prohibited by the due process clause. *Missouri Pacific R. Co.* v. *Nebraska ex rel. Board of Transportation*, (1896) 164 U. S. 403, 417, 17 S. Ct. 130, 41 L. Ed. 489, 495. The due process clause requires a public purpose in the state legislation before there can be a taking permissible under the due process clause. However, as discussed above, it clearly appears from prior decisions of this Court that the taking of private property caused by the Indiana Mineral Lapse Act would be considered a public use requiring just compensation, as well as other due process protections of notice and hearing.

B. Alternative Constitutionally Approved Methods Exist to Achieve the Goals of the Act.

It is clear that the Indiana Mineral Lapse Act attempts to satisfy public policy needs in an unconstitutional fashion —by taking property without providing notice, or an apportunity for the severed mineral interest owner to be heard regarding the lapse, or providing just compensation for the taking. The case law which this Court has developed in reviewing state escheat statutes reveals a constitutional path to achieve the policies underlying the Mineral Lapse Act and other similar legislation.

This Court has reviewed a number of cases involving state escheat statutes. See *Standard Oil Co.* v. *New Jersey*, (1951) 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 2d 1078; *Anderson National Bank* v. *Luckett*, (1944) 321 U. S. 233, 88 L. Ed. 692; *Security Savings Bank* v. *State of California*, (1923) 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301. In these cases, various statutes provided that certain "dormant" property—inactive bank accounts, unclaimed dividends, or the like—would escheat to the state after the passage of a fixed number of years of "dormancy." In each case, however, this Court has made it clear that escheat statutes must provide notice and an opportunity for the absent owner to appear and declare his or her interest in the property at issue. Thus, in *Anderson National Bank, supra,* the Court stated, "[O]ur inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." 321 U. S. at 243. *See also Security Savings Bank* v. *State of California, supra,* 263 U. S. at 287.

The notice and hearing requirement associated with escheat both protects the interests of private parties and

promotes the States' interest in unfettering forgotten or abandoned property simply and inexpensively. If the owner of a dormant bank deposit, for instance, responds to the notice by appearing at the hearing to claim his interest, title to the account is not transferred. If, however, after provision of the best possible notice under the circumstances, *see Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), no one appears to assert his or her ownership or other claim to the funds, the State can validly conclude that the property has been abandoned and can therefore order the transfer of the account without the payment of compensation to the absent or defaulting party. The transfer of the absent or defaulting parties' property to the state under these circumstances does not represent an unconstitutional taking of property without just compensation any more than a default judgment entered in an ordinary civil action involving title to real estate.

The objective sought to be promoted by the Mineral Lapse Act could similarly be achieved in a simple administrative or judicial proceeding, at the option of the State, notice of which is provided by, as in *Mullane*, personal notice to reasonably identifiable individuals and by publication to all others. If the owner of the mineral interest appears and asserts a claim to the interest, the proceeding could be terminated. If no one appears in response to the notice, the interest could be transferred to an identifiable owner on the ground that it has been abandoned. At the same time, the default by the record owner of the mineral interest means that no one will have appeared to whom compensation must be paid. So not only would the objective of the Act be achieved, but the constitutional flaw identified in the prior section would be rectified.

C. The Act Does Not Provide for Notice and Hearing to Contest the Legitimacy of the Taking.

Even if this Court held that due process did not require giving the severed mineral interest owner prior notice and an opportunity to come forward and preserve his interest, or be compensated for the loss of that interest, the Indiana Mineral Lapse Act would still violate due process by its failure to provide for notice and a hearing to the owner of the severed mineral interest regarding the legitimacy of the taking of the mineral interest. It was primarily because of this failure to provide notice and a hearing to the owners of the mineral interests that the trial court found the Act unconstitutional (Joint Appendix, page 35).

The Indiana Mineral Lapse Act makes no mandatory provision for giving notice, or providing a hearing, at any time, either before or after the taking of the severed mineral interest. Rather, the Act provides for a preemptory, automatic, self-executing and irremediable taking. Indiana Code 32-5-11-1 (Appendix A, page A-1), states:

> Any interest in coal, oil and gas, and other minerals, *shall*, if unused for a period of twenty years be extinguished, unless a statement of claim is filed in accordance with section 5 hereof, and the ownership *shall* revert to the then owner of the interest out of which it was carved. (Emphasis added.)

Indiana Code 32-5-11-6 (Appendix A, page A-4), states:

> Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, *may* give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is

> located and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. . . . (Emphasis added.)

As can be seen, there is no requirement whatsoever that notice be given to the owner of the mineral interest prior to the lapse of the mineral interest. After the lapse of the mineral interest, the successor in interest *may* give notice to the mineral interest owner of the fact that the mineral interest has already lapsed. However, even if such notice is given after the lapse of the mineral interest, there is nothing which the mineral interest owner can do to preserve the interest. Therefore, the taking of the mineral interest becomes final before any notice provision of the Indiana Mineral Lapse Act applies, and then the successor in interest has the option of giving notice of the lapse or remaining silent.

The Supreme Court of Indiana, in reversing the trial court's decision that the Act violated procedural due process protection, held that no hearing was necessary in that the Act merely set forth the conditions which, when existing, mandated the extinguishment of the mineral interest. If there was a dispute as to whether those conditions did in fact exist, then a court could be called upon to determine these facts. (Joint Appendix, page 41). The view expressed by the Supreme Court of Indiana indicates a fundamental misconception as to how the Act, in fact, operates. Typically what occurs is that the successor in interest—who is usually the surface owner—is aware of the date the mineral severance was created. If more than twenty years have passed since the severance, the successor in interest will examine the County Recorder's records or

have an abstract of title updated, in order to ascertain whether any use of the minerals appears of record or whether a statement of claim, pursuant to Indiana Code 32-5-11-4, has been filed. If no document appears of record which indicates that use was made of the mineral interest within the last twenty years or if no statement of claim was filed, then the successor in interest must make a determination as to whether use has been made of the mineral interest as provided for in the Act, Indiana Code 32-5-11-1, which might not appear of record. Such unrecorded uses might include an unrecorded lease, a lease over 20 years old but kept valid by production, or production of coal by the owner of the severed mineral interest from a common vein or seam. After making these factual determinations, the successor in interest then asserts ownership of the mineral interest based upon the severed mineral interest owner's failure to use the mineral interest or file a statement of claim. Since the successor in interest does not have to give notice of the extinguishment to the severed mineral interest owner, he can immediately begin to use the mineral interest by leasing or producing the minerals, without the severed mineral interest owner ever being made aware that someone is asserting ownership to the mineral interest. In fact, some types of mineral production, e.g. underground coal mining, may not even be apparent to the owner of the severed mineral interest upon inspection of the property.

Therefore, what the Act in fact does, is make the successor in interest—the individual who will directly benefit by the lapse of the severed mineral interest—the entity responsible for determining whether or not a statutory use has been made or a statement of claim filed pursuant to the Act.

It is beyond question that the ownership of real estate is a property interest protected by procedural due process. *Terrace* v. *Thompson*, (1923) 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255. As discussed in a prior section in this brief, the Indiana Mineral Lapse Act causes a taking of private property. It has been held by this Court that even a temporary deprivation of a property interest constitutes a taking requiring procedural due process protection. *Fuentes* v. *Shevin*, (1972) 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 556; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, (1975) 419 U. S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751. While the Indiana Mineral Lapse Act calls the transfer of property a "lapse", it certainly constitutes a significant taking of property within the purview of the due process clause of the Fourteenth Amendment. See *North Georgia Finishing* v. *Di-Chem, supra*, 419 U. S. at 606.

It is one of the most fundamental rights in our system of jurisprudence that before there can be a taking of private property by the state it is necessary that notice and a hearing be given. As was stated by this Court in the case of *Ochoa* v. *Hernandez y Morales*, (1913) 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427, on 57 L. Ed. 1427, 1437:

> Without the guarantee of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before the Magna Charta was embodied in that charter [2 Coke, Inst. 45, 50], and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law" all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of pro-

> cedure, and without notice or an opportunity for a hearing.

More recently, beginning with *Mullane* v. *Central Hanover Bank and Trust Company*, (1950) 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, this Court has again stated the minimum requirements of procedural due process:

> Many controversies have been raised about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case. 339 U. S. at 313.

While this court has held that it may not be necessary to have a predeprivation hearing, there must at least be a prompt postdeprivation hearing to correct any administrative error. See *Mackey* v. *Montrym*, (1979) 443 U. S. 1, 13, 99 S. Ct. 2612, 61 L. Ed. 2d 321, *Matthews* v. *Eldridge*, (1976) 424 U. S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18.

Once it is determined that there has been a taking of the property interest, and that due process protections apply, the inquiry becomes what process is due to protect the erroneous deprivation of that interest. *Mackey* v. *Montrym, supra*, 443 U. S. at 10. There are several factors which have been used by this court to resolve this inquiry:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. *Eldridge*, (1976) 424 U. S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18.

In the present case, the private interest affected by the state legislation is the ownership in fee simple of a mineral estate, the value of which could be quite substantial. The risk of erroneous deprivation of the severed mineral interest under the present statutory scheme is great inasmuch as the entity making the factual determinations is the successor in interest, the very individual who will most directly benefit by the lapse of the mineral interest. Furthermore, it would be of substantial value in preventing an erroneous deprivation of the mineral interest if the person making the determination as to whether a use had been made or a statement of claim filed was a disinterested party. Finally, the fiscal and administrative burden on the government in providing notice and a hearing regarding the lapse of the mineral interest, would be inconsequential in that the present state judicial system and judges could be employed to conduct the hearing. While there are no statistics on the number of severed mineral interests which would be subject to review, it would seem very unlikely that this would place any serious burden on the existing court dockets.

The test set forth in *Matthews* v. *Eldridge, supra,* concerned itself with whether a predeprivation hearing was required by due process, or whether a prompt postdeprivation hearing would suffice. The Mineral Lapse Act provides for no hearing whatsoever, and is therefore far more defective.

The Supreme Court of Indiana in its opinion in this case held that if there was a dispute regarding the facts as to whether a lapse had occurred, notice and a hearing would be provided by resorting to a court for a determina-

tion of the controversy. (Joint Appendix, pages 41 and 42). This court has repeatedly rejected the argument that common law remedies of pretermination injunction or a post-termination suit for damages is adequate for due process purposes. *Memphis Light, Gas and Water Division* v. *Craft, supra,* 98 S. Ct. at 1565-1566, n. 26; *Fuentes* v. *Shevin,* (1972) 407 U. S. 67, 85, 92 S. Ct. 1983, 32 L. Ed. 2d 556. Furthermore, speed and efficiency does not justify abrogation of due process rights. As the Court stated in *Stanley* v. *Illinois,* (1972) 405 U. S. 645, 92 S. Ct. 1209, 31 L. Ed. 551:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U. S. at 656.

Providing notice and a hearing to the owner of the severed mineral interest prior to the lapse of the interest would not impair the effectiveness of dormant mineral legislation. As previously discussed, the main purpose of the Indiana Mineral Lapse Act is to transfer ownership of severed mineral interest from persons who have left the area and cannot be located to the owner of the interest out of which it was carved, who presumably can be more readily located. However, as the present case indicates, the Indiana Mineral Lapse Act not only transfers the severed mineral interest from owners who have left the area and

cannot be located, but also transfers severed mineral interests from owners who are still living in the area and whose whereabout are known. Edna H. Bobe and Eden H. Pond, the owners of the severed mineral interest in the present case, were both living in an area near the subject property and their addresses were known to the successor in interest, Ulysses G. Walden, Jr., and Carolyn Sallee Walden (Joint Appendix, page 7). Furthermore, Consolidation Coal Company was able to ascertain and locate the owners of the severed mineral interest and obtain a coal lease from them. (Joint Appendix, pages 6 and 7). Therefore, in the present case, the Indiana Mineral Lapse Act — by not providing notice and a hearing to the severed mineral interest owners giving them an opportunity to file a statement of claim or prove that a use had been made within the statutory framework — actually impedes mineral development by creating confusion as to the ownership of the mineral interest.

Irrespective of other constitutional deficiencies, the Indiana Mineral Lapse Act could quite simply be modified to satisfy procedural due process notice and hearing requirements. Essentially, all that need be done is make the notice requirement of section 6 of the Act (Appendix A, page 49) applicable to all severed mineral interest owners. The statute would then provide that every severed mineral interest owner, not just those with ten or more interests, must be given notice — either actual notice, or if their whereabout are unknown, by publication — and they would have sixty days to record a statement of claim after such notice is given. Furthermore, a hearing could be set with the county court sometime after the expiration of the sixty day period in which a determination would be made as to whether a statement of claim was filed or a statutory

use made of the severed mineral interest. This simple statutory change would still accomplish the principal purpose of the statute by transferring severed mineral interests from owners who cannot be located and who have left the area, but at the same time allow a severed mineral interest owner who can be found an opportunity to preserve his interest and/or challenge the lapse of the interest.

D. The Act Is Not Analogous to Remedial Types of Legislation.

In the courts below, the Appellees have argued that the Mineral Lapse Act is analogous to remedial legislation such as statutes of limitation, recording acts and marketable title acts. The Supreme Court of Indiana relied heavily on the analogy of the Mineral Lapse Act with statutes of limitations in support of its finding that the Mineral Lapse Act was constitutional. (Joint Appendix, pages 42 to 45). An examination of other remedial types of legislation reveals the substantial differences which exist between them and dormant mineral statutes.

With regard to statutes of limitation, this Court has noted:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedience rather than principles. They are practical and pragmatic devices. . . .

Chase Securities Corporation v. *Donaldson,* (1945) 325 U. S. 304, 314, 65 S. Ct. 1137, 89 L. Ed. 1628. Statutes of limitations are devices to protect the integrity of the judicial process by excising stale claims and thereby preventing citizens from confronting the unfairness of defending claims long after evidence has disappeared and memories

faded. *Id.;* see also *Levy* v. *Stewart,* (1870) 78 U. S. 244, 11 Wall 244; *United States* v. *Kubrick,* (1979) 444 U. S. 111.[30] A mineral lapse statute cannot be so justified. To the contrary, by making title to a mineral interest depend upon evidence of the level of activity and development of a mineral estate that may be 15-20 years old, and often not of public record, the Indiana Court encourages litigation of factual issues that may be presently difficult to prove. Furthermore, the import of the Mineral Lapse Act is substantive — the transfer of a mineral estate to persons whom the state believes are more likely to develop those resources — rather than procedural. As the Indiana Court admitted, "the Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well." (Joint Appendix, page 48). The Michigan Supreme Court made a similar statement in its recent case upholding that State's dormant mineral act:

> None of the provisions of the Act purport to be concerned with the owner's intent to abandon * * * rather, the Act is designed to increase the marketability and development of severed mineral interests

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[30]The Indiana Supreme Court passed over another important distinction between the Mineral Lapse Act and statutes of limitations. The Mineral Lapse Act operates upon a property interest, not a mere cause of action. Under Indiana law, the mineral estate owner has no cause of action that he can pursue against the surface owner. Thus, his failure to file a claim cannot be taken as a waiver of whatever rights he might have against the surface owner. This distinction, which was found to be persuasive by other courts reviewing similar dormant mineral legislation, see *Wilson* v. *Bishop,* (1980) 82 Ill. 2d 364, 412 N. E. 2d 522; *Contos* v. *Herbst,* (Minn. 1979) 278 N. W. 2d 732, 745, was rejected out of hand by the Indiana Supreme Court.

by creating a rule of substantive law. . . . *Bickle* v. *Fairchild*, (1980) 410 Mich. 21, 299 N. W. 2d 704, 713.

Thus, the Indiana statute and other similar mineral lapse acts cannot be saved by analogy to statutes of limitation.

Similarly, Indiana's Mineral Lapse Act is not like marketable title acts or other title recordation statutes. This type of legislation, as with statutes of limitation, serves a narrower purpose and operates on different interest than does the Mineral Lapse Act. Mineral title acts "essentially provide that 'when one person has a clear record title to land for a designated period (which varies from 20-50 years), inconsistent claims or interests which arose before that period are extinguished unless the adverse claimant seasonably records a notice of this claim or interest'." Spies, *Annual Survey of Virginia Law, Property*, 51 Va. Rev. 1621, 1660, n. 61 (1965). See also Anno., 71 A. L. R. 2d 846, "Marketable Title Statutes" (1960). Faced with competing or potentially competing claims to the same property, marketable title legislation removes ancient or technical impediments to title in favor of the owner of clear record title to the same property. Marketable title acts recognize that an ancient adverse claim to property (the Indiana Marketable Title Act, I.C. 32-1-5-1 through 32-1-5-10, designates a period of 50 years) has probably been satisfied or a decision was made not to exercise the contingent adverse claims through litigation. A marketable title act sorts out and decides the claims on an effective basis.[21]

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[21]One of the leading authorities on marketable title legislation has warned against the overly broad application of marketable title principles to inapposite land use problems. *See* P. Bayse, *Clearing Land Titles*, § 216, at 317 (1953).

The Mineral Lapse Act does not purport to decide between competing claims to the same property. The Mineral Lapse Act by interposing requirements for certain forms of mineral extraction activities, registration, and the like, actually *creates* conflicting claims between surface owners and the severed mineral interest owners which would not otherwise arise. Finally, it is clear that the Indiana Act cannot be upheld by reference to simple recording acts. They are justified under essentially the same rationale as marketable title acts. Under a recording act, a subsequent bona fide purchaser's title to property is deemed superior to that of a prior purchaser who failed to record the deed or other instrument evidencing the transaction upon which he bases his claim of ownership. They are intended to protect innocent parties who purchase property. The person purchasing property without actual or constructive notice or knowledge of an adverse claim to the property should not have to take subject to that adverse claim. Moreover, the recording act does not take the entire "bundle of rights" from the prior purchaser; he is left with a cause of action against the seller. Compare *Penn Central Transportation Company* v. *New York City, supra,* 438 U. S. at 137. The Mineral Lapse Act, by contrast, deprives owners of mineral interests of every vestige of ownership.

In sum, Indiana has purported to encourage the development of oil, gas and coal through the taking of private property without observing the procedural and substantive safeguards required by the Constitution. By upholding the legislature's choice of means in this case, the Indiana Supreme Court has "forgotten that a strong public policy to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional

way of paying for the change." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at 416.

V. THE INDIANA MINERAL LAPSE ACT IMPAIRS THE OBLIGATIONS OF CONTRACTS BY DESTROYING A VESTED CONTRACTUAL RIGHT.

The Constitution of the United States, Article I, Section 10, states in paragraph 1:

> No state shall . . . pass any bills of attainder, *ex post facto* law, a law impairing the obligations of contracts, or grant any title of nobility.

The Indiana Mineral Lapse Act provides for the transfer of a severed mineral interest from the owner of that interest to the person, or his successors or assigns, who contractually agreed to the original severance of the mineral interest. In the present case, the appellants, Eden H. Pond and Edna H. Bode, in the Warranty Deed dated March 1, 1954, created a severed mineral estate by reservation (Joint Appendix, pages 10 and 11). The Indiana Mineral Lapse Act destroys this contractual reservation by transfering the mineral interest to the very person, or his successors or assigns, who had originally agreed to the severance (Joint Appendix, pages 5 to 7).

In two recent cases this court has reasserted that the contract clause is not without meaning in modern constitutional jurisprudence. In the case of *United States Trust Company* v. *New Jersey,* (1977) 432 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92, this court held unconstitutional a 1974 New Jersey statute which retroactively repealed a 1962 covenant limiting the ability of the Port Authority of New York and New Jersey to subsidize rail transportation with revenue pledged as security for bonds, because it consti-

tuted an impairment of the state's obligation of contract with the bond holders. *Allied Structural Steel Company* v. *Spannaus,* (1978) 438 U. S. 234, 98 S. Ct. 217, 57 L. Ed. 2d 727, rehearing denied 99 S. Ct. 233, involved a Minnesota statute which subjected private employers of 100 or more employees, who provided pension benefits under qualified plans, to a "pension funding charge" upon termination of the plan if the pension funds were not sufficient to cover full pensions for all employees who had worked at least ten years. This court struck down the statute on the basis that it impaired the company's contractual obligation to its employees under the pension agreement with them. Furthermore, the Supreme Court of the State of Nebraska in the case of *Wheelock* v. *Heath,* (1978) 201 Neb. 835, 272 N. W. 2d 768, held that the Nebraska dormant mineral legislation was unconstitutional in part because it violated the contract clause of the United States Constitution.

Under Indiana law, a grant of the right to the coal estate conveys with it as a necessary incident to the right of ownership, the right to use such means and processes for mining and removing the coal from the premises as may be reasonably necessary. *Ingle* v. *Bottoms,* (1902), 66 N. E. 160, 160 Ind. 73. It has also been held under Indiana law that the execution, delivery and acceptance of a deed containing a reservation, constituted a contract between the parties thereto. *City of Elkhart* v. *Christiana Hydraulics,* (1945) 223 Ind. 242, 59 N. E. 2d 353. A reservation in a conveyance, whereby a right is reserved in the grantor, carries with it all the usual and necessary incidents and appurtenances of such right. It carries with it all that is necessary for the beneficial use and full enjoyment of such reserved right. *City of Elkhart* v. *Christiana Hydraulics, supra,* 59 N. E. 2d at 357. Applying these principles to the

present case, when Eden Pond and Edna Bobe reserved the minerals under the subject property in the deed of March 1, 1954, they also reserved implied rights that were necessary for the beneficial use and enjoyment of the mineral reservation. The deed with the reservation constituted a contract between Edna Bobe and Eden Pond, Grantors, and Ulysses Grant, and the successors and assigns of Ulysses Grant, as Grantees, with certain on-going and continuing obligations. The Indiana Mineral Lapse Act by causing the severed mineral interest to revert to the owner of the interest out of which it was carved totally destroys the reservation and the rights appurtenant thereto.

While this Court has held that it is customary in reviewing economic and social regulations for courts to defer to the judgment of the legislature as to the reasonableness and necessity of the legislation, private contracts are not subject to unlimited modification under the police power. *United States Trust Company* v. *New Jersey,* (1977) 431 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92, at 109. While this Court recognized in *Allied Structural Steel Company* v. *Spannaus,* (1978) 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 727, that a state's exercise of its police power is paramount to any rights in the contracts between individuals, it noted:

> If the contract clause is to retain any meaning at all . . . it must be understood to impose some limits upon the power of a state to abridge existing contractual relations, even in the exercise of this otherwise legitimate police power. 438 U. S. at 242.

Before examining the extent of the limits placed upon the state's power to abridge existing contractual relationships, a preliminary determination that a contract has been technically impaired is necessary. *Home Building and*

Loan Association v. *Blaisdell,* (1934) 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413. This seems to be easily satisfied in the present case in that the mineral reservation, and its appurtenant rights, are not only impaired, but destroyed. The next step in the inquiry was set out in *Spannaus, supra,* 438 U. S. at 244-245:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

After a severe impairment of the contract is found, a careful examination of the nature and purpose of the state legislation is necessary. *Spannaus, supra,* 438 U. S. at 245. Five significant factors were set forth in the case of *Home Building and Loan Association* v. *Blaisdell, supra,* 290 U. S. at 245-247, regarding whether the legislation constitutionally impairs contracts. These factors were also utilized by this Court in *Spannaus, supra,* 438 U. S. 242. These factors are: (1) whether there was an emergency need for the state legislation; (2) whether the legislation was enacted to protect a basic societal interest and not merely a favored group; (3) whether the relief was appropriately tailored to the emergency that it was designed to meet; (4) whether the conditions imposed were reasonable; and (5) whether the legislation was limited to the duration of the emergency.

Applying the above factors, this Court in *Spannaus, supra,* 438 U. S. at 248-249, found that the state law in

question was not enacted to protect a broad societal interest but rather a narrow class. It also found that the legislation imposed "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees" without the desperate emergency economic conditions of the 1930's.

Application of the court's reasoning in *Spannaus* to the Indiana Mineral Lapse Act in the present case leads to the conclusion that the Act cannot withstand scrutiny under a contract clause analysis. As in *Spannaus,* the Mineral Lapse Act substantially alters the contractual relationship between the record owner of the mineral interest and the owner of the surface estate, by superimposing obligations upon the mineral interest owner beyond those he had voluntarily agreed to undertake. Since the Indiana Mineral Lapse Act effectively extinguishes traditional contractual rights upon which individuals have placed great reliance in the ordering of their business and personal affairs, the "height of the hurdle" which this legislation must clear is quite substantial. As in *Spannaus,* the impairment imposes heavily on legitimate contractual expectations, which expectations did not include the substantial changes which the Indiana Mineral Lapse Act caused.

In line with this court's emphasis in the *Spannaus* case on the owner's reasonable reliance on legitimate contractual expectations, *Id.* 438 U. S. at 246, the Indiana Mineral Lapse Act destroys the reasonable expectations of the parties to the original conveyance by retroactively imposing obligations which neither party intended to be a part of the contractual arrangement. There is nothing in the legislative history which indicates that the Act was meant to serve an emergency need. It should be pointed out that the Act was passed in 1971, which was prior to the energy crisis

created by the oil shortage in 1973. Furthermore, the nature and the purpose of the Indiana Mineral Lapse Act does not justify the severe impairment of contractual rights which the Act causes. As can be seen by the present case, the Indiana Mineral Lapse Act does not only serve to transfer severed mineral interests from owners of the severed minerals who cannot be located, but also serves to transfer mineral interests from persons whose whereabouts are known and can easily be located. The Indiana Mineral Lapse Act destroys private property rights, which constitute a basic societal interest, in favor of a limited class of surface owners who otherwise possess no claim or right to the mineral estate. Certainly, the nature and purpose of this legislation cannot justfy this severe impairment of contract.

VI. THE INDIANA MINERAL LAPSE ACT MAKES A CLASSIFICATION WHICH DEPRIVES ONE CLASS OF BASIC CONSTITUTIONAL RIGHTS WHICH IS ALSO ARBITRARY AND CAPRICIOUS

The Fourteenth Amendment to the United States Constitution states in Section 1:

> No state shall . . . deny to any person within its jurisdiction equal protection of the law.

As previously discussed in this brief, the Indiana Mineral Lapse Act makes no mandatory provision that notice be given to the owner of the severed mineral interest regarding the lapse of the mineral interest. However, Indiana Code 32-5-11-5, (Appendix A, page 48) being Section 5 of the Indiana Mineral Lapse Act, makes an exception to the general absence of any notice requirement by requiring that notice of the lapse of the mineral interest be given to

a special class of mineral interest owners to foreclose the availability of a special remedy available only to that class. Essentially, this exception provides that any owner of ten or more mineral interests in a given county, who has filed a statement of claim with respect to one or more of such interests but who inadvertently fails to preserve one or more of its interests, has sixty days after the giving of the statutory notice of the lapse of the mineral interest in which to file a claim to preserve the interests. Therefore, the Indiana Mineral Lapse Act creates a classification which favors a special interest group by requiring that, in certain situations, they be given notice and an opportunity to file a statement of claim prior to the lapse of their interests. This small group, singled out by the legislature, is provided due process protection which enables them to protect their property and contractual interests, while denying similar protection to all the other severed mineral interest owners who are in equal need of such protection.

This court has stated that when a state statutory classification approaches sensitive and fundamental rights, strict scrutiny will be used to examine such legislation. *Tremble* v. *Gordon*, (1977) 430 U. S. 762, 97 S. Ct. 1459, 62 L. Ed. 2d 31. In *Stanley* v. *Illinois*, (1972) 405 U. S. 645, 92 S. Ct. 1209, 31 L. Ed. 2d 551, this court held that a statute which deprived an unwed father of a hearing on his fitness as a parent while extending this protection to all other parents whose custody of their children is challenged, violated the equal protection clause of the Fourteenth Amendment. *Id.* 405 U. S. at 649. The Indiana Mineral Lapse Act by depriving a large class of severed mineral interest owners of a basic right to be notified of the taking of their property, and by depriving them of an opportunity to challenge that taking or take affirmative action to prevent it—while offer-

ing such procedural due process protection to a select group—violates the equal protection clause of the Fourteenth Amendment.

Even if this court would view the classification in the Mineral Lapse Act as being in the category of social and economic legislation, thereby only requiring that the legislation not be arbitrary and capricious, *U. S. Railroad Retirement Board* v. *Fritz*, (1980) ____ U. S. ____, 101 S. Ct. 453, 66 L. Ed. 2d 368; *New Orleans* v. *Dukes*, (1975) 427 U. S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511, the Indiana Mineral Lapse Act would still fail to meet this low level of scrutiny.

The reason this exception was placed in the Indiana statute was because representatives of coal companies who were asked to participate in the drafting of the statute objected to any provisions which would automatically terminate their interests due to inadvertent failure to file a statement of claim. It was contended that their interests were often very complex and based upon documents of great antiquity. The major mineral owners were afraid that they might inadvertently fail to file a statement of claim even though they had made a diligent effort to do so. See Polston, *Legislation, Existing and Proposed, Concerning Marketability of Titles*, 7 Land and Water Law Review 73, at pp. 100-101. Therefore, this exception which appears in the Indiana Mineral Lapse Act was in response to the efforts of a particular group, who were in no greater need of protection than the other members of the class. In fact, large mineral interest owners who have substantial capital and personnel to keep abreast of legislation affecting their mineral interests are in far greater position to protect their interests than individual mineral interest owners, who often may not even be aware of the existence of the Mineral

Lapse Act. Furthermore, the purpose of the Indiana Mineral Lapse Act, being the promotion of the development of the mineral interest by identifying and locating the owners of the mineral interest, would best be served by giving prior notice to all mineral interest owners along with an opportunity for them to protect their rights by filing a statement of claim before the lapse becomes final. It would seem that the administrative inconvenience involved would be minimal. It is evident that this classification in the Mineral Lapse Act is arbitrary and capricious in that it gives special treatment to members of a favored class who are in no greater need of such protection than other members of the class.

CONCLUSION

For the reasons set forth in this brief, it is respectfully requested that the Indiana Mineral Lapse Act be declared unconstitutional and null and void insofar as it pertains to the Appellants, and that the decision of the Indiana Supreme Court be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

(Compiler's additions shown in bold face type)

32-5-11-1 [46-1808]. Lapse of mineral interest — Prevention. — Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. **[IC 32-5-11-1, as added by Acts 1971, P. L. 423, § 1.]**

32-5-11-2 [46-1809]. Mineral interest — Definition. — A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. **[IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-3 [46-1810]. Use of mineral interests — Definition. — A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. **[IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-4 [46-1811]. Statement of claim — Filing — Requirements. — The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two **[one]** [32-5-11-1] or within two [2] years after the effective date **[September 2, 1971]** of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. **[IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]**

32-5-11-5 [46-1812]. Extinguishment of mineral interest — Exceptions. — Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such

notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. **[IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-6 [46-1813]. Successor in interest — Notice requirements — Prima facie evidence. — Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, tht such notice was given. **[IC 32-5-11-6, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-7 [46-1814]. Statement of claim — Filing — Recorder's duty. — Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven **[six]** [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. **[IC 32-5-11-7, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-8 [46-1815]. Waiver of chapter's provisions — Time Limit. — The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. **[IC 32-5-11-8, as added by Acts 1971, P.L. 423, § 1.]**